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OF MONTANA

COMPILED, REVISED AND ANNOTATED
UNDER CHAPTER 184, LAWS OF 1945 AND CHAPTER 266, LAWS OF 1947
AND PUBLISHED UNDER CHAPTER 43, LAWS OF 1947

I. W. Choate

Wesley W. Wertz

CODE COMMISSIONERS

REPLACEMENT

VOLUME 3

PART 1

Forests and Forestry to Insurance and Insurance Companies

Containing the Permanent Laws of the State in
Force at the Close of the Thirty-seventh
Legislative Assembly of 1961

Publishers
THE ALLEN SMITH COMPANY
Indianapolis, Indiana



REVISED CODES OF MONTANA

1947

ANNOTATED

NINE VOLUMES

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Indianapolis

REPLACEMENT

VOLUME 2

PART 1

Various and Peculiar to Jurisdiction and Insurance Companies

Containing the Permanent Laws of the State in
Force at the Close of the Thirty-second
Legislative Assembly of 1961

THE ALLEN SMITH COMPANY
Indianapolis, Indiana

PREFACE

As the State of Montana continues to grow, so do its laws and court decisions. The original Volume Three of the 1947 REVISED CODES OF MONTANA first was replaced following the 1953 session of the Legislature. Since then, almost 400 pages of new laws, amendments and annotations have been compiled into the pocket supplement for this volume and these figures do **not** include the new Insurance Code which has been inserted in Title 40.

Hence a new issue of Volume Three became essential under the replacement program approved by State authorities and the Montana Bar Association. In order to provide books that are not too cumbersome and to permit supplementation for a longer period, the 1961 edition of Replacement Volume Three has been published in two parts. Part 1 contains Titles 28 through 40 and Part 2 includes Titles 41 through 55.

The two books constituting Replacement Volume Three now contain all existing laws in the titles specified above through the Thirty-seventh Legislative Assembly and all notes and annotations have been brought to date. Obsolete laws have been removed; also excluded are local and special laws, appropriation acts, resolutions, enacting and repealing clauses.

The same numbering system and arrangement of the original volume have been retained and hence the General Index may be used as heretofore in locating a particular law. Legislative history references have been brought to date and no changes were made in the general style of the Montana Codes.

The annotations to the decisions of the Supreme Court of Montana and to the Supreme Court of the United States and other Federal courts have been brought up to and including volume 135 Montana Reports and subsequent Montana decisions to and including volume 362 Pacific 2d, volume 365 United States Reports, volume 4 Lawyers' Edition 2d, volume 81 Supreme Court Reporter, volume 289 Federal Reporter 2d, volume 192 Federal Supplement, volume 26 Federal Rules Decisions and volume 77 American Law Reports 2d.

This volume may be cited as Repl. Vol. 3 (Part 1), Revised Codes of Montana, 1947. When referring to sections, we recommend citing "Sec. —, Repl. Vol. 3 (Part 1), Revised Codes of Montana, 1947."

We extend our sincere thanks to Wesley W. Wertz, Code Commissioner of the 1947 Codes, for his advice and assistance in the preparation of this Replacement.

The Publishers

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28-101. State board of forestry created—membership. For the purpose of protection and conservation of forest resources, forest range and

water, of regulation of stream flow, and of prevention of soil erosion, and for the further purpose of more adequately promoting and facilitating the co-operation, financial and otherwise, between the state of Montana and all of the public and private agencies with which it is now or later may be associated in such work, there is hereby created the Montana state board of forestry, hereinafter designated as the board. The board shall consist of the governor of the state of Montana, who shall be ex officio chairman of the board, and seven additional members who shall be appointed by the governor as follows:

- (1) One member of the state water conservation board of Montana, upon the recommendation of this board.
- (2) One elector of the state of Montana upon the joint recommendation of the Blackfoot forest protective association and the northern Montana forestry association or their successors.
- (3) One elector of the state of Montana upon the joint recommendation of the Montana stock growers' association and the Montana wool growers' association or their successors.
- (4) One elector of the state of Montana who shall be a representative farm woodland owner, owning not less than forty (40) acres and not more than four hundred (400) acres of forest land classified as such by the board. This member shall be appointed by the governor from individual recommendations to be submitted by the three farmers' organizations—the Montana state grange, the Montana farm bureau federation and the Montana farmers' union or their successors.
- (5) One elector of the state of Montana upon the recommendation of the Montana lumber manufacturers' association or its successors.
- (6) One elector of the state of Montana who shall be a member of the faculty of the Montana school of forestry upon the recommendation of the president of the Montana state university.
- (7) One elector of the state of Montana on the recommendation of the regional forester, region one, United States forest service.

The members appointed shall serve for a term of four (4) years, or during their continuance in office, as the case may be. In the event of death, resignation or disqualification of any member of the board, his successor shall be appointed in the same manner that he was appointed, and shall serve for the remainder of his term. The board shall hold two (2) regular meetings each year at the times and places designated by it. The dates of such regular meetings shall be shown in the permanent minute book of the board and notice of the date, time and place of each meeting shall be given in the manner prescribed by the board. The governor as ex officio chairman shall designate a member of the board to serve as acting-chairman of the board for such meetings as he personally is unable to attend. The state forester of Montana shall serve as secretary of the said board, and the board may contribute to his salary as indicated by section 81-1403. No compensation shall be paid to any member of the said board by the state of Montana for any services rendered or work done, except that members of the board attending authorized reg-

ular or special meetings for transacting official business will be allowed actual expenses in attendance at such meetings. Special meetings may be called in the manner prescribed by the board.

History: En. Sec. 1, Ch. 128, L. 1939; amd. Sec. 1, Ch. 141, L. 1941; amd. Sec. 1, Ch. 169, L. 1959.

Cross-Reference

State forests, secs. 81-1401 to 81-1416.

Collateral References

Woods and Forests 7.

98 C.J.S. Woods and Forests § 13.

See generally, 22 Am. Jur. 593, Fires.

Constitutionality of reforestation or forest conservation legislation. 13 ALR 2d 1095.

28-102. Functions of board. It shall be the function of the board to co-operate in an advisory capacity with the state water conservation board and all public and other agencies in the development, protection and conservation of the forest, range and water resources in the state of Montana, and to carry out the specific authorities and duties hereinafter imposed upon it.

History: En. Sec. 2, Ch. 128, L. 1939.

28-103. Definitions, as used in this chapter. Forest land, for fire protection purposes, is defined as any land which has enough timber, standing or down; slash or brush, to constitute in the judgment of the board a fire menace to life or property, provided, that grassland and agricultural areas are included when such areas are intermingled with or contiguous to areas of forest land.

Forest fire is defined as a fire burning uncontrolled on forest lands.

Organized forest fire protection district is defined as a definite forest land area, the boundaries of which are fixed, and wherein, forest fire protection is provided through the medium of an agency recognized by the board.

Recognized agency is defined as an agency representing owners of forest lands in an organized forest fire protection district, organized for the purpose of providing forest fire protection in such district and recognized by the board as giving adequate fire protection to such forest lands in accordance with rules and regulations prescribed by the board. Any public agency administering and protecting forest lands may also be recognized by the board as such an agency.

Forest fire season is defined as the period of each year beginning on May first and ending on September thirtieth, inclusive; provided, however, that in the event of excessive or great fire danger, this period may be expanded when in the judgment of the state forester dangerous fire conditions exist. When so expanded, the state forester shall give public notice.

Forest fire protection is defined as the work of prevention, detection and suppression of forest fires.

Protection zone is a broad area within which the forest fire protection costs are approximately the same. Protection zones will be designated by the state forester, with the approval of the board.

Owner is defined as the person, firm, association or corporation having the actual, beneficial ownership of forest land, or timber, other than an easement, right of way, or mineral reservation.

History: En. Sec. 3, Ch. 128, L. 1939;
amd. Sec. 1, Ch. 216, L. 1955; amd. Sec. 1,
Ch. 93, L. 1959.

28-104. Responsibility of actual owner of land or timber—scope of act. (a) In any instance where the owner as herein defined does not appear upon the public records as the holder of the legal title to such land or timber, he is nevertheless primarily responsible for the performance of the acts and duties imposed upon him by this act. Where the owner of the timber is not the owner of the land, the primary responsibility for the performance of the acts and duties imposed by this act shall be upon the owner of the timber.

(b) Sections 28-101 to 28-129 shall apply to all forest lands within the state of Montana which shall be officially classified by the board as forest lands according to the definition of forest land in section 28-103 hereof.

History: En. Sec. 4, Ch. 128, L. 1939;
amd. Sec. 3, Ch. 141, L. 1941; amd. Sec. 1,
Ch. 94, L. 1959.

Collateral References

Woods and Forests § 5.
98 C.J.S. Woods and Forests § 5.

28-105. Powers of board. To effectuate, accomplish and maintain the purposes of this act, the board is hereby authorized and empowered:

(a) To classify the forest land areas of the state for which conservation and fire protection measures are reasonably required, and to change or modify such classification from time to time as in its judgment shall be proper.

(b) To create organized forest fire protection districts.

(c) To provide through the state forester for forest fire protection of any forest lands by the state forester's organization, or by contract or any other feasible means, in co-operation with any federal, state or other recognized agency or agencies.

(d) To make and enforce reasonable rules and regulations for the purpose of enforcing and accomplishing the provisions and purposes of this act; provided, however, such rules and regulations shall not conflict with the powers of the state board of land commissioners.

(e) To co-operate with the government of the United States and any of its bureaus, services and agencies in accordance with federal statutes and regulations thereunder.

History: En. Sec. 5, Ch. 128, L. 1939;
amd. Sec. 1, Ch. 90, L. 1959.

28-106. Board to give technical advice. The board is hereby authorized and empowered to give technical and practical advice to the farmers of the state concerning soil and forest conservation and the establishment and maintenance of woodlots, windbreaks and shelters.

History: En. Sec. 6, Ch. 128, L. 1939.

28-107. Board to assist land commissioners. The board is hereby directed to assist the state board of land commissioners in the protection, economic development, and use of the state forests and forest land held by the state for the purposes and benefit of the common schools and state institutions.

History: En. Sec. 7, Ch. 128, L. 1939.

28-108. State considered "owner" when. Where the state has title to forest lands within any organized forest protection district, it shall be considered as an owner and it shall list its lands and pay the assessments to the recognized agencies responsible for lands in such organized forest protection districts.

History: En. Sec. 8, Ch. 128, L. 1939.

28-109. Duty of owner of classified forest land. Every owner of forest land classified as such by the board is hereby required to furnish protection against the starting or existence, and to suppress the spread, of fire on such land during the full period of each forest fire season defined by this act. Such protection and suppression shall be in conformity with reasonable rules and standards for adequate fire protection to be prescribed by the board. If such owner does not provide for such protection and suppression, said board may provide the same, at a cost to the landowner of not more than ten cents (10¢) per acre per year for Class I land and not more than three cents (3¢) per acre per year for Class II land and in the event thereof, the owner of such land shall pay to the county treasurer of the county in which such land is situated, the charge for the same approved by the board, in accordance with the provisions of this act. No other charges shall be assessed those landowners participating, except in cases of proven negligence on the part of the landowner or his agent.

The forest land of Montana shall be classified for protection and assessment purposes as follows:

(a) Class I Land. Shall include all forest land primarily suitable for production of timber, forest land primarily suitable for joint use for timber production and the grazing of livestock as a permanent or semi-permanent joint use or as a temporary joint use during the interim between logging and reforestation.

(b) Class II Land. Shall include all lands primarily suitable for grazing or other agricultural purposes, which are intermingled with or contiguous to the land described in subsection (a), above.

History: En. Sec. 9, Ch. 128, L. 1939; 1, Ch. 188, L. 1955; amd. Sec. 1, Ch. 91, amd. Sec. 2, Ch. 141, L. 1941; amd. Sec. L. 1959.

28-110. What constitutes compliance. Every owner of Class I and Class II forest lands within an organized forest protection district, while a member of, or while participating in a recognized agency for forest protection shall be deemed to have fully complied with the requirements of section 28-109.

In establishing boundaries of organized forest fire protection districts covering forest lands described in section 28-109 (a) and (b), the board may for the purpose of administrative convenience designate roads, pipelines, streams, or other recognizable landmarks as boundaries.

History: En. Sec. 10, Ch. 128, L. 1939;
amd. Sec. 1, Ch. 92, L. 1959.

28-111. Determination of cost of fire protection—certification—tax levy.

The state forester will prepare a fire protection plan, for the approval of the board in which fire protection costs for each classification within each protection zone is determined. The board will establish the portion of the planned fire protection costs to be borne by the state, and the portion to be borne by the owners of classified forest land. The state forester will request the legislature to appropriate the state's portion as approved by the board. After the appropriation is made by the legislature, the board will cause an assessment to be made on the owners of classified forest land, as specified in section 28-109, sufficient to bring the total amount received to the amount specified in the approved plan.

On or before the second Tuesday in August of each year, the secretary shall determine the names of all owners who shall have failed to provide the forest fire protection for their lands required by this act, together with the description of such lands and the acreage thereof, and calculate the total amount due to the board from each such owner for such forest fire protection which shall not exceed the maximum hereinbefore specified.

The secretary shall submit a statement of the foregoing to the board and upon approval thereof by the board, the secretary shall certify in writing to the county assessor of each county, the names of such owners of forest lands in his county, together with a description of such lands and a statement of the amount so found to be due and owing by each of such owners to the board for forest fire protection.

Upon receiving such certificate from the secretary showing the amount due, the county assessor shall extend the amounts so certified upon the county tax rolls covering such lands, and such sums shall become obligations of the owner to be paid and collected in the same manner and at the same time and with like penalties as general state and county taxes upon the same property are collected. All sums so collected shall be promptly transmitted to the state treasurer, who is hereby required to deposit the same in a special fund designated the foresters' co-operative work fund, as provided for in section 81-1410.

History: En. Sec. 11, Ch. 128, L. 1939;
amd. Sec. 1, Ch. 95, L. 1959.

28-112. Payment under protest. Any owner who is required to pay to the county treasurer any sum for forest protection as required by this act and who contends that he is not legally obligated to pay such sum or some part thereof, shall pay the same to the county treasurer under written protest stating the reasons for such protest. Such payment under protest, and all proceedings subsequent thereto, shall be in conformity with the provisions of the law of the state of Montana, providing for the payment

of taxes under protest and action to recover the same. In the hearing and determination of any such action to recover such payment under protest, all questions of the legality and reasonableness of the proceedings of the board may be reviewed and decided.

History: En. Sec. 12, Ch. 128, L. 1939.

28-113. Amount due for protection—lien on land—remedies. Whenever the said board provides forest protection during a forest fire season for any forest land or timber not protected by the owner thereof as required by this act, the amount due for such forest protection shall be and become a lien upon such land or timber which shall continue until such time as the amount due shall have been paid. Such lien shall have the same force, effect and priority as general tax liens under the laws of the state of Montana, and shall be subject and inferior only to tax liens on such lands. The county attorney of the county in which such land is situated shall on request of the said board foreclose the said lien in the name of the state of Montana and in the manner provided by law, or said county attorney upon the request of the said board, shall institute an action against the forest landowner, in the name of the state, in any district or justice court having jurisdiction, to recover the debt, and the state in such action shall not be required to pay any fees or costs to the clerk of the court or justice of the peace. The complaint and all subsequent proceedings in such action shall conform as nearly as practicable to that provided by section 84-4302. The remedies provided by this section shall be deemed cumulative and shall not affect the other provisions of this act for the payment and collection of amounts due to the board.

History: En. Sec. 13, Ch. 128, L. 1939.

28-114. Permit for burning required. During the forest fire season or any expansion thereof, defined by this act, no person shall ignite or set any forest fire, or slash burning fire, or land clearing fire, or debris burning fire, or any open fire, within any forest lands, without having obtained an official written permit to ignite or set such fire from a firewarden or peace officer authorized by the board to issue such permits for such lands; provided, that no permit shall be required to build, set or ignite a campfire within and upon a designated improved camping ground, or upon a plot of land from which all vegetable and inflammable matter and debris shall have been removed to a point where it may not become ignited by the said campfire or by sparks therefrom.

History: En. Sec. 14, Ch. 128, L. 1939.

28-115. Failure to extinguish campfire—penalty. Any person who shall fail to extinguish any campfire set or ignited by him within any forest lands before leaving the same, or shall fail to extinguish any campfire used by him or left in his charge, before leaving the same, or who shall negligently allow such fire to spread from the plot described in section 28-114, shall be guilty of a misdemeanor.

History: En. Sec. 15, Ch. 128, L. 1939.

28-116. Penalty for failure to comply with permit. Every person to whom a written permit shall have been issued to set or ignite a fire within forest lands during the forest protection season defined by this act, shall comply strictly with the provisions of such permit. If such person shall fail to comply with such provisions, or shall leave such fire unattended, or shall leave such fire before it shall have been totally extinguished, or shall negligently allow such fire to spread from or beyond the burning area defined by the said permit, he shall be guilty of a misdemeanor. The board with the assistance of the state forester, shall prescribe the form and substance of such permit.

History: En. Sec. 16, Ch. 128, L. 1939.

28-117. Throwing lighted cigarettes, etc.—penalty. During the forest fire season, as defined by this act, any person who shall throw or place any lighted cigarette, cigar, ashes or other flaming or glowing substance or any substance or thing that may cause a fire, in any place where such lighted cigarette, cigar, match, ashes, or other flaming or glowing substance, or other substance or things, may directly or indirectly start a fire in or near any forest material, or throw from a vehicle any lighted cigarette, cigar, ashes or other flaming or glowing substance, or any substance or thing that may cause a fire, shall be guilty of a misdemeanor.

History: En. Sec. 17, Ch. 128, L. 1939.

28-118. Spark arresters to be provided for engines, etc. During the forest fire season, as defined by this act, no person shall use, drive or operate within any forest lands, any wood or coal burning locomotive, logging engine, portable engine, traction engine, or stationary engine, or any coal or wood burning jammer or loader, or internal combustion engine, which is not equipped with a modern, efficient and adequate spark arrester and with modern, efficient devices to prevent the escape of sparks, coals, cinders and other burning material from the smoke stack, fire box, ash pan or exhaust of any such engine, jammer or loader. And it shall be unlawful for any person to operate any such engine, jammer or loader, within any forest lands during any forest protection season, except when such spark arrester and other devices herein defined are efficient, complete and properly installed for the purpose intended.

History: En. Sec. 18, Ch. 128, L. 1939.

28-119. Sawdust piles—restrictions. No sawmill located within or contiguous to forest lands shall accumulate in one pile, sawdust in excess of an amount resulting from the sawing of five hundred thousand (500,000) feet log scale of saw logs, provided, however, that a larger sawdust pile may be accumulated when there is no reasonable danger of fire therefrom and a permit for the additional accumulation is granted by the state forester. Each sawdust pile so accumulated shall be prepared for burning by cribbing the base of each pile with slabs and burned in accordance with regulations issued by the board of forestry.

History: En. Sec. 19, Ch. 128, L. 1939;
amd. Sec. 1, Ch. 222, L. 1955.

28-120. Destruction of signs—penalty. Any person who shall destroy, deface, remove, injure, or disfigure any sign, placard, proclamation, order, warning or notice issued by any federal, state, or forest protection agency under the provisions of this act and erected or posted at any point in the state, shall be guilty of a misdemeanor.

History: En. Sec. 20, Ch. 128, L. 1939.

28-121. Disposition of fines collected. All fines collected in any court of the state under the provisions of this act shall be transferred to the state treasurer for deposit, in, and for the credit of, the foresters' co-operative work fund as hereinafter provided. Whenever a person is convicted in any court of a violation of this act, the court shall have power to levy and collect as costs in such case the amount necessary to compensate the county for the expenditures made in and for the prosecution of such offender against the provisions of this act. Such costs when collected shall be deposited by the court, with the proper county treasurer for the benefit of such county.

History: En. Sec. 21, Ch. 128, L. 1939.

28-122. Land commissioners and county commissioners to co-operate. The state board of land commissioners and boards of county commissioners may co-operate with the board to the extent legally permissible, in providing means and methods of safeguarding the forest land lying within the state and in preventing fire nuisance thereon. The state board of land commissioners and the boards of county commissioners may list any forest lands under their jurisdiction with any recognized agency or the board for forest protection. Such moneys as the state and counties shall become liable for under the provisions of this section shall be paid from any funds provided by law for the protection of the forest lands owned by the state and counties.

History: En. Sec. 22, Ch. 128, L. 1939.

28-123. Disposal of moneys—foresters' co-operative work fund. In compliance with section 81-1410, all moneys received from all public agencies, private agencies and individuals co-operating with the state forester or the board of forestry, shall be deposited with the state treasurer and placed to the credit of the foresters' co-operative work fund. The following funds may be expended as directed by the board for fire prevention, detection and suppression: All moneys collected by county treasurers as assessments on forest lands for forest protection; moneys collected for the abatement of public nuisances; all fines collected for the violations of this act; the state's share of the co-operative fire protection funds allocated by the federal government and any other funds provided for the purposes herein indicated. All other co-operative funds collected, appropriated or allocated for the use of the state forester, including funds for the removal of slash hazards resulting from logging or other wood operations on state and private forest lands, those provided for the purpose of helping to maintain the maximum productivity of the forests of the state, those provided for purposes designed to assist the farmers of the state

in the establishment of windbreaks and woodlots in localities where such forest plantings are helpful, and funds for other co-operative work, shall not be expended except for the specific purposes for which the same were collected, appropriated or allocated.

History: En. Sec. 23, Ch. 128, L. 1939.

28-124. Disbursement of moneys. All co-operative moneys collected, appropriated, or allocated for the use of the state forester and deposited with the state treasurer in the foresters' co-operative work fund, shall be paid out after approval and request of the said board and all vouchers or claims shall be signed on behalf of the said board by the secretary thereof. The state board of examiners is hereby authorized to approve for payment (out of any moneys available for purposes designated) all claims properly executed and submitted in the manner provided by law to the person, firm, corporation or public or private agency entitled thereto in compliance with the provisions of this act.

History: En. Sec. 24, Ch. 128, L. 1939.

28-125. Ex officio firewardens—powers. The officers, employees and persons hereinafter designated are hereby declared ex officio firewardens to serve without compensation for the purpose of enforcing the penal provisions of this act: Members of the Montana state board of forestry, the state forester and all regular employees of his office, officers of organized forest protection districts, members of the Montana highway patrol, all field officers, in the United States forest service residing in Montana, game and deputy game wardens, officers of the national park service and the Indian service situated in Montana. Such ex officio firewardens shall have all the powers vested by section 81-1413.

History: En. Sec. 25, Ch. 128, L. 1939.

28-126. Powers and duties of state forester. The state forester shall be the agent of the said board and he shall have power to enforce any and all provisions of this act and the rules and regulations of the board made thereunder. He shall be the representative of the board in organizing forest protection districts to be approved by the said board. He shall be the co-ordinating officer of the board in the co-ordination of the work and efforts of all agencies co-operating with the said board, in the protection of forest land, and in the prevention and abatement of any forest fire nuisances thereon, under the provisions of this act. He shall be the expert adviser of the board and of agencies co-operating with the board and existing under this act, in all matters relating to the creation of forest protection districts, and disposal of slash and slash hazards, the prevention and suppression of forest fires and forest fire nuisances, within forest protection districts. His office shall be the principal place of business of the board and all orders, rules, regulations, maps, documents, publications, minutes of regular and special meetings of the board, notices, forms, correspondence, petitions and all and every paper connected with any part of the official business of the board shall be filed in his office. Such records shall be open to public inspection during business hours subject to such

reasonable rules as the board may prescribe in writing for the protection of such records and the convenience of the public and the employees of the state forester.

History: En. Sec. 26, Ch. 128, L. 1939.

28-127. Penalty for violation of act. Any person who violates any term or provisions of this act, or any rule or regulation promulgated by the board pursuant to this act, is hereby declared to be guilty of a misdemeanor unless otherwise provided by this act, and shall be punished by a fine of not more than five hundred dollars (\$500.00) or imprisonment in a county jail for not more than six (6) months, or both such fine and imprisonment.

History: En. Sec. 27, Ch. 128, L. 1939.

28-128. Purpose of act. It is the intent and purpose of this act not to impose or levy, or cause to be imposed or levied, any tax upon the property of any persons. This act is passed and adopted in the exercise of the police power of the state of Montana to conserve and protect the forests and resources of the state as herein provided. All payments required by the act by owners of forest lands are hereby declared to be compensation for benefits actually received by such owners in the protection of their lands as herein provided for.

History: En. Sec. 28, Ch. 128, L. 1939.

28-129. Owners of forest lands may have hearing before board—conditions. Any owner, or the accredited representative of any owner, of forest land classified as such by the board, within any organized forest protection district, subject to the provisions of this chapter, shall upon request, be granted a hearing before the board or the executive committee thereof, on any subject pertaining to the activities of the board, or of the state forester as secretary or agent of the board, or any recognized agency as agent of the board, affecting such owner's property; provided, that no request for a hearing before the board shall have the effect of suspending the operations of the board, or any such agent of the board, undertaken pursuant to the provisions of this chapter, but, upon such hearing, the board may terminate such operations if found unreasonable; and, provided further, that any hearing pertaining to costs charged against the forest land of any owner for protection thereof, as provided in section 28-109, must be requested on or before the fifteenth day of August of each year.

History: En. Sec. 4, Ch. 141, L. 1941.

28-130. Policy for control of forest diseases. It is declared to be the public policy of the state of Montana, in order to protect and preserve forest resources from destruction by forest insect pests and tree diseases, to protect the forests and watersheds of Montana, to enhance the production of forests, to promote the stability of forest industry, to protect the recreational values of the forest, to independently and through co-operation with the federal government and private forest landowners adopt meas-

ures to control, suppress and eradicate outbreaks of forest insect pests and tree diseases.

History: En. Sec. 1, Ch. 25, L. 1953.

28-131. Construction of words "forest land." For the purposes of this act any land shall be considered forest land which has enough forest growth, standing or down, to constitute, in the judgment of the state forester and the state board of forestry, an insect or disease infestation breeding ground of a nature to constitute a menace, injurious and dangerous to the forest resources in the district or zone of infestation.

History: En. Sec. 3, Ch. 25, L. 1953.

28-132. Forest landowner defined. "Forest landowner" is defined as the person, firm, association or corporation having the actual, beneficial ownership of forest land or timber, other than an easement, right of way or mineral reservation.

History: En. Sec. 4, Ch. 25, L. 1953.

28-133. Forest infestation—zoning—suppression or eradication. Whenever the state forester determines that there exists an infestation of forest insect pests or forest tree diseases injurious to the timber of forest growth on forest lands within the state of Montana, and that said infestation is of such a character as to be a menace to the timber or forest growth of this state, the state forester shall, with the written approval of the state board of forestry, declare the existence of a zone of infestation, and shall declare and fix the boundaries so as to definitely describe and identify the said zone of infestation.

Thereupon, the state forester or his agent shall have the power to go upon the land within said zone of infestation and cause the forest insect pest infestation or forest tree disease to be suppressed, eradicated and destroyed in the manner approved by the state board of forestry, and in order to accomplish the suppression, eradication and destruction of such infestation, the state forester may enter into co-operative agreement with the federal government and other public or private agencies, and with forest landowners using such funds as have been or may hereafter be made available for such purposes.

History: En. Sec. 5, Ch. 25, L. 1953.

28-134. Abolition of zone of infestation. Whenever the state forester determines that forest insect or disease control work within the designated zone of infestation is no longer necessary or feasible, then the state forester on advice and written consent of the state board of forestry, shall abolish the zone of infestation.

History: En. Sec. 6, Ch. 25, L. 1953.

CHAPTER 2

FOREST LANDS ADVISORY COMMISSION

(Repealed—Section 1, Chapter 79, Laws of 1953)

28-201 to 28-203. Repealed.

Repeal

These sections (Secs. 1-3, Ch. 176, L. 1943), relating to the forest lands advisory

commission, were repealed as Chapter 2 of Title 28 by Sec. 1, Ch. 79, Laws 1953.

CHAPTER 3

ESTABLISHMENT OF STATE FOREST AND CONSERVATION EXPERIMENT STATION

- Section 28-301. Montana forest and conservation experiment station established.
 28-302. Director.
 28-303. Purposes of station.
 28-304. Reports.
 28-305. Oaths of office.

28-301. Montana forest and conservation experiment station established. There is hereby established in the Montana state university, forestry school, a station to be known as the Montana forest and conservation experiment station, which shall be under the direction of the state board of education.

History: En. Sec. 1, Ch. 141, L. 1937. Constitutionality of reforestation or forest conservation legislation. 13 ALR 2d 1095.

Collateral References

Woods and Forests 8.
 98 C.J.S. Woods and Forests § 12.

28-302. Director. The dean of the forestry school, whoever shall hold that office from time to time, shall be the director of said Montana forest and conservation experiment station. The state board of education shall have the power and it shall be its duty to appoint or designate such assistants and employees as may be necessary, and to fix the compensation of all persons connected with said station.

History: En. Sec. 2, Ch. 141, L. 1937.

28-303. Purposes of station. It shall be the purpose of this station:

1st. To study the forest and forest land resources of the state to the end that the state and its citizens may attain the highest economic and social benefits from the forest soils within the state and the influences and products flowing therefrom.

2nd. To study the growth and the utilization of timber with special reference to their improvement and the widening of the markets available to the state.

3rd. To determine the relationship between the forest and water conservation and waterflow regulation; the forest and pasturage for domestic livestock and wild life; the forest and recreation and those other direct

and indirect benefits that may be secured by the maintenance of or the establishment of forests or woodlands.

4th. To study and develop the establishment of windbreaks, shelter belts and woodlots on the farms of the state that moisture may be conserved thereby for the best production of agricultural crops and forage; for the prevention of soil wastage and erosion; to make the farm home more comfortable and to produce forest material for the use of the farmer and the stockman.

5th. To study the findings of other agencies that the information thus obtained may be used to improve the growth, management and utilization of the timber within the state and to protect it against damage by fire, insects, disease and other harmful agencies.

6th. To collect, to compile and to publish statistics relative to Montana forests and forestry and the influences flowing therefrom; to prepare and publish bulletins and reports, with the necessary illustrations and maps that the information collected by said station in forestry and in conservation may be made available for use and to distribute said information or material in such other ways as the state board of education may direct.

7th. To collect a library and bibliography of literature pertaining to or useful for the purpose of this act.

8th. To study logging, lumbering and milling operations and other operations dealing with the products of forest soils with special reference to their improvement; to investigate, and make tests of forest products produced or that may be produced within the state that markets may be improved thereby.

9th. To consider such other scientific and economic problems as, in the judgment of the state board of education, are of value to the people of the state.

10th. To co-operate with the other departments of the university of Montana, the state forester and the state board of land commissioners, the state fish and game commission, the state livestock commission and with other departments and branches of the state government when mutually beneficial, with private individuals and agencies; and to co-operate with the United States government and its branches as a land grant institution, or otherwise, in accordance with their regulations.

11th. To establish such field experiment stations as in the judgment of the state board of education may be necessary. The state board of education is hereby authorized to accept, for and in behalf of the state of Montana, such gifts of land or other donations as may be made to the state for the purposes of this act.

History: En. Sec. 3, Ch. 141, L. 1937.

28-304. Reports. The state board of education may require such regular and special reports to be prepared as it deems necessary. Such regular reports and the special reports and bulletins, with proper illustrations and maps, shall be printed and distributed as the state board of education may direct, and as the interests of the state and of science and industry may demand.

History: En. Sec. 4, Ch. 141, L. 1937.

28-305. Oaths of office. The dean of the forestry school, the officers and employees of said station, appointed or assigned, and their assistants shall take an oath to perform all the services required of them under this act and to guard carefully all confidential information accumulated in the progress of their work; and to turn into the station as state property all correspondence, notes, illustrations, and data of any kind accumulated by them in performing the work of the station.

History: En. Sec. 5, Ch. 141, L. 1937.

CHAPTER 4

DISPOSAL OF SLASHINGS AND FOREST DEBRIS

- Section 28-401. Piling and burning of brush and forest debris.
 28-402. Disposal of slashings.
 28-403. Slashings lien.
 28-404. Reduction or management of fire hazard created by cutting timber.
 28-405. Reduction of slash and forest debris along right of way.
 28-406. Purchaser will insure compliance, prior to purchase, will transmit withheld money to state forester—penalty.
 28-407. Disposal of slash—injunction against further cutting—disposal at expense of owner—lien and enforcement—orders.
 28-408. Supervision by state forester.
 28-409. Delegation of powers to state firewardens.
 28-410. Contracts with owners of forest lands.
 28-411. Methods of reducing hazards—contracts with forest protective agencies.
 28-412. Certificate of clearance.

28-401. (2778.5) Piling and burning of brush and forest debris. Everyone clearing right of way for any railroad, public highway, public trail, private highway, private road, trail, ditch, dike, pipeline or wire line, or any other transmission or transportation utility right of way, except temporary roads, chutes or trails used in actual logging operations, shall pile and burn all refuse timber, brush, slash or debris cut for such clearing or resulting from the cutting of material for the construction of said public or private utility unless exempted by the state forester.

The piling shall be done as rapidly as cutting or clearing progresses, and burning shall be completed within one (1) year from time of cutting. If burning be done during the closed season it must be done in compliance with all the provisions of this act relative to burning permits during the closed season.

The provisions of this section shall apply to all clearing of rights of way on behalf of the state, county, highway districts and road districts, whether the work be done by day labor, or by contract, and less unavoidable emergency prevents, provisions shall be made by the proper officials conducting, directing, or letting said work for withholding until it is complete, a sufficient portion of the payment therefor to assure compliance with this act.

Violations of any of the provisions of this section shall be deemed a misdemeanor and be punishable by a fine of not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00).

In addition to the penalty herein provided, the offender may be enjoined, at the instance of the state forester, or of the firewarden of the district, from proceeding with such work until the provisions of this section shall have been complied with; and, upon application of the state forester, or of the firewarden of the district, to any court of competent jurisdiction, a writ of mandate shall issue compelling the offender to fully comply with the provisions hereof.

History: En. Sec. 5, Ch. 95, L. 1927.

Collateral References

Constitutionality of reforestation or forest conservation legislation. 13 ALR 2d 1095.

28-402. (2778.6) Disposal of slashings. Every person, firm or corporation, hereinafter called the operator, who shall hereafter, for commercial purposes, cut any timber, logs, trees, posts, ties, poles, cordwood, pulpwood or any other forest product upon any lands within the state of Montana, shall remove any forest fire hazard to the property of others that may be created by the slashings, or other forest debris incident to such cutting operations. Provided, however, that an expenditure in excess of seventy-five cents (75c) for each one thousand (1,000) feet log scale, or the equivalent thereof if products other than logs are cut, shall not be required. Slash and debris will be disposed of during the cutting operations or as soon thereafter as is practical. Provided, however, that any fire hazard to the property of others created by said slash and debris shall under no conditions be allowed to remain for more than eighteen (18) months in any portion of the cutting area except with written permission of the state forester. If and when the operator has satisfactorily disposed of said slash or debris in accordance with the law and the rules and regulations of the state board of forestry he will be so notified, in writing, by the state forester.

Any operator, as defined herein, may elect to have said slash and debris, incident to his cutting operations treated, protected or disposed of by the state forester under the rules and regulations of the state board of forestry. Said operator will deposit with the state forester the estimated costs of such disposal at such times and in such amounts as the state forester may direct, but in no event shall such deposit or payment exceed, in the aggregate, an amount equal to seventy-five cents (75c), multiplied by the number of thousand of feet log scale cut from the forest area involved. The state forester will refund to said operator all sums deposited over and above costs of slash and debris treatment, protection or disposal.

Each person, firm or corporation, hereinafter called the purchaser, who shall hereafter purchase or contract to purchase any timbers, logs, ties, posts, poles or other forest products cut from any forest lands within the state of Montana, shall within five (5) days after making said purchase or contract to purchase, notify the state forester of such purchase or contract together with the name of the person furnishing said forest products and the name of the owner of the land from which said products are cut. Each purchaser shall withhold, before making payment for such products a sum equal to seventy-five cents (75c) for each thousand (1,000)

feet log scale or the equivalent thereof if forest products other than logs are to be cut under such contract, unless the state forester has notified said purchaser that slash and debris from the cutting operator furnishing the forest products has been disposed of, or that the cutting operator has complied with the law. When the state forester is satisfied that said slash and debris, creating a fire hazard to the property of others, has been or will be legally treated, protected or disposed of by the cutting operator in accordance with the requirements of law and of the rules and regulations of the state board of forestry, he will release said money withheld by purchaser to insure compliance with the law. If, on or before the conclusion of said purchase or contract to purchase, the state forester has not released said withheld moneys the purchaser shall, upon demand, immediately remit the moneys withheld to the state forester. The state forester will issue receipt, therefore, to the purchaser. Said receipt shall discharge the purchaser from any and all liability for moneys withheld from cutting operator in the amounts shown by said receipt. The state forester shall retain such moneys as a surety covering treatment, protection or removal of said slash and debris or may, at his discretion procure the treatment, protection or disposal of said slash and debris by applying said money, or so much thereof as may be necessary in payment of the costs of such abatement.

History: En. Sec. 6, Ch. 95, L. 1927; amd. Sec. 1, Ch. 81, L. 1931; amd. Sec. 1, Ch. 34, L. 1941; amd. Sec. 1, Ch. 83, L. 1949; amd. Sec. 1, Ch. 18, L. 1953; amd. Sec. 1, Ch. 230, L. 1955.

Collateral References

Woods and Forests 6.

98 C.J.S. Woods and Forests § 7.

Liability of one cutting and removing timber under deed or contract for failure to remove or dispose of debris, trimmings, or tops. 56 ALR 2d 400.

28-403. (2778.7) Slashings lien. If any operator shall fail, refuse or neglect to remove, treat or protect slash hazards hereafter created in accordance with the requirements of law and of the rules and regulations of the state board of forestry within a period of thirty (30) days after the date of a written order to remove, treat or protect such slash hazards, the state forester may procure the removal of the slashings, or such part thereof as he shall deem necessary and he shall immediately afterwards notify the operator that had failed to remove the slash hazards, of the cost of their removal and demand payment of the cost thereof, which shall not be in excess of seventy-five cents (75c) per thousand (1000) feet log scale or the equivalent thereof, if forest products other than logs have been cut, plus ten per cent (10%) to cover additional costs incurred by the state. If payment of the sum demanded be not made to the state forester within (30) days after the date of such demand, the state forester must transfer all papers relative to the unsatisfied demand for payment to the attorney general of the state, who shall bring legal action on behalf of the state to recover the debt. If the amount expended by the state forester for the removal, treatment or protection of the slashings be not paid within the time herein required, a lien as security for the amount of the debt shall attach to the land on which the slashings were created and/or the timber or other forest products cut or produced from such land from and

after the date that notice of such lien shall be filed by the state forester in the office of the clerk and recorder of each county in which said land is situated.

Violation of any of the provisions of section 28-402 or this section shall be a misdemeanor and be punishable by a fine of not more than five hundred dollars (\$500.00). Such offender may be enjoined at the instance of the state board of forestry from proceeding with any cutting in violation of the provisions of any law enacted for the protection of property from fire hazard, or of the rules and regulations of the state board of forestry.

History: En. Sec. 7, Ch. 95, L. 1927;
amd. Sec. 2, Ch. 34, L. 1941; amd. Sec. 2,
Ch. 83, L. 1949.

28-404. Reduction or management of fire hazard created by cutting timber. Everyone engaged, or about to engage, in the cutting of any forest product or conducting standing improvement such as, but not limited to, thinning, weeding and pruning, upon private lands within the state of Montana shall provide for the reduction or management of the fire hazard to the property of others thus created or to be created by entering into a fire hazard reduction agreement as provided in sections 28-408 to 28-412, or by posting a bond to the state of Montana in such form and for such amount as may be prescribed by the state forester; provided, however, that the amount of the bond so prescribed shall not be in excess of the amount which such person would be required to pay under said sections 28-408 to 28-412, and that the bond shall be conditioned upon full and faithful compliance with all requirements under said sections 28-408 to 28-412, and the faithful reduction or management of such fire hazards in the manner prescribed by law. Such bond shall be released upon completion of the work in compliance with the terms of the bond. The state forester shall issue a certificate of compliance with the terms of this section to all persons who have complied therewith.

History: En. Sec. 1, Ch. 207, L. 1959.

Collateral References

Woods and Forests § 6.

98 C.J.S. Woods and Forests § 7.

34 Am. Jur. 526, Logs and Timber, § 53.

28-405. Reduction of slash and forest debris along right of way. Every-one clearing right of way for any railroad, public highway, public trail, private road, trail, ditch, dyke, pipeline or wire lines, or any other transmission or transportation utility right of way, except temporary roads located within the boundaries of the cutting area and which are used in the actual logging operations, shall reduce the hazard resulting from such clearing or from the cutting of material for the construction of such public or private utility unless exempted by the state forester.

Hazard reduction, including burning where this method of disposal is used, shall be done as rapidly as cutting or clearing progresses; provided that upon application to the state forester he may grant a permit extending the time within which such burning must be done in compliance with all the provisions of this chapter relating to burning permits during the closed season.

The provisions of the section shall apply to all clearing of rights of way across private land and on behalf of the state, county, highway districts and road districts, whether the work be done by day labor, or by contract, and unless unavoidable emergency prevents, provision shall be made by the proper officials conducting, directing, or letting said work for withholding until it is complete, a sufficient portion of the payment therefor to assure compliance with this act.

Violations of any of the provisions of this section shall be deemed a misdemeanor and be punishable by a fine of not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1000.00).

In addition to the penalty herein provided the offender may be enjoined, at the instance of the state forester from proceeding with such work until the provisions of this section shall have been complied with; and, upon application of the state forester to any court of competent jurisdiction, a writ of mandate shall issue compelling the offender to fully comply with the provisions thereof.

History: En. Sec. 2, Ch. 207, L. 1959.

28-406. Purchaser will insure compliance, prior to purchase, will transmit withheld money to state forester—penalty. The initial purchaser of forest products which have been cut or are about to be cut from any private lands within the state of Montana, shall before making such purchase or contract to purchase determine that the persons, firm or corporation engaged, or about to engage, in the cutting of these forest products, has provided for the reduction or management of the fire hazard thus created, as provided in sections 28-404 to 28-412. When the hazard reduction agreement provides that the purchaser of forest products shall withhold moneys to insure faithful compliance with sections 28-404 to 28-412, said purchaser will transmit any moneys which are withheld to the state forester.

Violation of any of the provisions of this section shall be deemed a misdemeanor and be punishable by a fine of not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1000.00).

History: En. Sec. 3, Ch. 207, L. 1959.

28-407. Disposal of slash—injunction against further cutting—disposal at expense of owner—lien and enforcement—orders. In the event one responsible therefor shall fail, refuse or neglect to properly dispose of slash in accordance with the requirements of sections 28-404 and 28-406, and such person responsible therefor is engaged or is about to engage, either for himself or for another, in cutting timber or other forest products, and thereby creating a fire hazard anywhere within the state, he may be enjoined from cutting such timber and thereby creating a fire hazard until he shall have complied with the provisions of sections 28-404 and 28-406. Such injunction proceedings may be instituted by the state forester as plaintiff and the court may in its discretion grant a temporary injunction. In any such proceedings no bond shall be required of the plaintiff and such proceedings shall be handled with expedition in the district court of the county where the land is located.

If one responsible therefor has for any reason failed to comply with sections 28-404 and 28-406, and has without such compliance cut any forest products and shall fail, refuse, or neglect to obtain compliance for a period of thirty days after being notified so to do by the state forester, the state forester, may, if he deems it advisable, complete, direct or authorize the disposal of such slash at the expense of the owner of the timber or other forest products cut or produced from the land upon which such fire hazard remains undisposed of as aforesaid.

The cost and expense of such disposal, plus twenty per cent (20%) of the cost and expense of such disposal as a penalty, shall constitute a lien upon the forest products so cut or produced from such land. If payment of the sum demanded be not made to the state forester within ten (10) days of such written demand, the state forester must transfer all papers relative to the unsatisfied demand for payment to the attorney general of the state, who shall bring legal action on behalf of the state to recover the debt.

The state forester shall not file for record any lien against the property of any person who has been issued a certificate of compliance with sections 28-404 and 28-406, covering such property.

All orders and directions issued by the state forester as required by this section and section 28-404 shall be in writing and made in duplicate, the original of which shall be sent or delivered to the person to receive such orders, permits or directions; one copy shall be filed in the office of the state forester.

History: En. Sec. 4, Ch. 207, L. 1959.

28-408. Supervision by state forester. The state forester, under such rules as the state board of forestry may provide, shall supervise the reduction or management of any fire hazard to the property of others created by the cutting of any forest product on private land in the state of Montana.

The reduction or management of fire hazards referred to in this act may include or be limited to the taking of protective measures to prevent injury or the destruction of forest resources without actual abatement of the hazard.

History: En. Sec. 5, Ch. 207, L. 1959.

28-409. Delegation of powers to state firewardens. The state forester is hereby authorized and empowered to delegate any power granted to the state forester under sections 28-408 to 28-412, to any state forest firewarden.

History: En. Sec. 6, Ch. 207, L. 1959.

28-410. Contracts with owners of forest lands. The state forester is hereby authorized and empowered to enter into agreements with the owners of any forest lands or any operator engaged in operations on lands within the state of Montana whereby slash is created, and under said contract the state forester may assume all responsibility for the reduction or management of any fire hazard; any such contract shall provide the amount to be paid by the owner or operator to the state forester

by reason of his agreement to assume the reduction or management, of such fire hazard. Said amount shall not exceed one dollar (\$1.00) for each one thousand (1000) feet log scale, or the equivalent thereof if forest products other than logs are cut.

History: En. Sec. 7, Ch. 207, L. 1959.

28-411. Methods of reducing hazards—contracts with forest protective agencies. The reduction or management of such fire hazards shall be carried on by the state forester and the state firewardens in keeping with modern and progressive forest practices and more effective fire control and the state forester is hereby authorized to enter into contracts with forest protective agencies, including agencies of the United States of America, for the reduction or management of such fire hazards when in his opinion the work can best be accomplished in that manner. The state forester, state firewardens, and recognized forest protective agencies, including any agency of the United States of America, with which the state forester has entered into an agreement for the reduction or management of any fire hazard as herein provided, and any officer or official of such agency, shall not be liable for any damage to the land, product, improvement, or other things of value of whatsoever nature upon the lands on which the fire hazards are being managed or reduced in accordance with provisions of sections 28-408 to 28-412, when all requisite care and caution has been used and such work is being or has been performed in compliance with the rules provided in section 28-408.

History: En. Sec. 8, Ch. 207, L. 1959.

28-412. Certificate of clearance. Any owner or operator who has entered into a contract with the state forester for the reduction or management of any fire hazard and upon payment of the contract price in accordance with the terms of said contract and the full compliance with the terms of said contract by such owner or operator, shall be granted a certificate of clearance and be relieved of any and all further liability and responsibility for the removal or reduction of any such fire hazard; provided, however, that in such event the operator shall deposit a cash bond, equivalent to the contract price, with the state forester conditioned upon the faithful performance of said contract.

History: En. Sec. 9, Ch. 207, L. 1959.

CHAPTER 5

COUNTY FORESTS—CREATION AND MANAGEMENT BY BOARD OF COUNTY COMMISSIONERS

- Section 28-501. Creation of "county forests" by county commissioners authorized.
28-502. County owned tax deed lands may be exchanged.
28-503. Sale of timber and other crops of county forests, procedure for.
28-504. Breach of timber sale agreement, recourse.
28-505. Dead and down timber—permits for domestic use.
28-506. Proceeds of sales or permits, apportionment and distribution of.
28-507. Construction of act.

28-501. Creation of "county forests" by county commissioners authorized. The board of county commissioners of any county in the state of Montana is hereby authorized to create "county forests" from any lands in such county principally valuable for the timber thereon or for the growing of timber, which lands have been acquired by such county by tax deed and have been offered for sale at public auction and not sold, or have been acquired by such county by exchange for lands acquired by tax deed. Such county forests shall be established by resolution of the board of county commissioners of such county and may be discontinued by resolution of said board.

History: En. Sec. 1, Ch. 70, L. 1945.

Cross-Reference

County commissioners may provide money for fire protection, sec. 16-1104.

Collateral References

Woods and Forests 8.

98 C.J.S. Woods and Forests § 12.

Constitutionality of reforestation or forest conservation legislation. 13 ALR 2d 1095.

28-502. County owned tax deed lands may be exchanged. After any lands acquired by the county by tax deed have been offered for sale at public auction and not sold, the board of county commissioners may exchange such lands for other lands which are principally valuable for the timber thereon or for the growing of timber, if, in the opinion of such board of county commissioners, it is in the best interests of such county to acquire such other lands for the purpose of creating county forests or for the purpose of consolidating such lands with then existing county forests.

History: En. Sec. 2, Ch. 70, L. 1945.

28-503. Sale of timber and other crops of county forests, procedure for. The board of county commissioners may sell the timber crop and other crops of county forests, under such rules and regulations as it may establish; provided, however, that a notice of any proposed sale of timber in excess of one hundred thousand feet (100,000) board measure shall be advertised at least once in a newspaper published in the county at least thirty (30) days prior to the closing of bids as specified in said notice, and the board of county commissioners shall receive sealed bids up to the hour of the closing of bids. The board of county commissioners may reject any or all bids, or it may award the sale to the highest responsible bidder. Upon award of sale, the purchaser shall execute a formal agreement, which shall describe the area on which the timber is to be cut, the approximate amount to be cut by species, the rate for each product of each species, stipulate that all timber shall be paid for in advance of cutting, fix a date for termination of the agreement, define rules of silviculture, cutting, utilization, scaling, and slash disposal, and incorporate such other rules as in the discretion of the board of county commissioners are essential to the perpetuation of the county forests. As a guarantee for the faithful performance of the agreement, the purchaser shall be required to furnish a bond, with sufficient securities, to the county, in an amount equal to at least twenty per cent (20%) of the estimated value of the timber sold.

History: En. Sec. 3, Ch. 70, L. 1945.

28-504. Breach of timber sale agreement, recourse. Upon breach of any timber sale agreement, the board of county commissioners is authorized to suspend cutting or removal of the timber, and, upon advice and counsel of the county attorney, to take such steps as are deemed by it necessary to adjust the breach or to liquidate the county's claim for damages, or to submit the case to the county attorney for collection on the bond.

History: En. Sec. 4, Ch. 70, L. 1945.

28-505. Dead and down timber—permits for domestic use. Permits may be issued free of charge for dead, down, or inferior timber in such quantities and under such restrictions and regulations as the board of county commissioners may approve for fuel and domestic purposes to residents and settlers of the county.

Permits may be issued to citizens of the state of Montana for commercial purposes at commercial rates without advertising, under such restrictions and rules as the board of county commissioners may approve, for timber in quantities of one hundred thousand feet (100,000) board measure, or less. Repeated permits of this kind shall not be issued to avoid advertising and the consequent competition secured thereby.

History: En. Sec. 5, Ch. 70, L. 1945.

28-506. Proceeds of sales or permits, apportionment and distribution of. The proceeds of every such sale or of the issuance of any such permit shall be paid over to the county treasurer who shall apportion and distribute the same in the following manner:

(a) The proceeds of each sale up to the amount of ten (\$10.00) dollars shall be credited to the county general fund to reimburse such for expenditures made therefrom in connection with the holding of such sale or the issuance of such permit.

(b) If there shall be any amount remaining of such proceeds and such remainder is in excess of the aggregate amount of all taxes and assessments accrued against such property for all funds and purposes, without penalty and interest, then so much of such remaining proceeds shall be credited to each fund or purpose, as the same would have received had such taxes been paid before becoming delinquent and all excess shall be credited to the general fund of the county.

(c) If there shall be any amount remaining of such proceeds and such remainder is less in amount than the aggregate amount of all taxes and assessments accrued against such property for all funds and purposes, without penalty or interest, such proceeds shall be prorated between such funds and purposes in the proportion that the amount of taxes and assessments accrued against such property for each such funds or purpose bears to the aggregate amount of taxes and assessments accrued against such property for all funds and purposes.

History: En. Sec. 6, Ch. 70, L. 1945.

28-507. Construction of act. Nothing in this act shall be construed as repealing sections 84-4190 to 84-4197 or sections 28-101 to 28-128.

History: En. Sec. 7, Ch. 70, L. 1945.

CHAPTER 6

PROTECTION AND CONSERVATION OF FOREST AND
FARM RESOURCES BY COUNTY COMMISSIONERS

- Section 28-601. Authority of county commissioners to protect range, farm and forest resources.
28-602. Functions of the board.
28-603. Powers of board.
28-604. Lands to which applicable.

28-601. Authority of county commissioners to protect range, farm and forest resources. For the purpose of protection and conservation of range, farm and forest resources, and of the prevention of soil erosion, the respective boards of county commissioners are hereby authorized to perform the functions hereinafter provided.

History: En. Sec. 1, Ch. 173, L. 1945.

Constitutionality of reforestation or forest conservation legislation. 13 ALR 2d 1095.

Collateral References

Woods and Forests ⇨ 7.

98 C.J.S. Woods and Forests § 7.

28-602. Functions of the board. The functions of the respective boards of county commissioners with respect to rural fire control shall be to carry out the specific authorities and duties hereinafter imposed.

(1) To provide for the organization of volunteer rural fire control crews;

(2) To appoint a county rural fire chief and such district rural fire chiefs, subject to the direction and supervision of the county rural fire chief, as they may deem necessary. The county rural fire chief shall be a regular county officer, who in the opinion of the board is the best qualified to perform the duties of this office and who shall serve without additional compensation for the duties hereby imposed. All district fire chiefs shall serve without compensation;

(3) Boards of county commissioners, acting pursuant to this act, may co-operate with federal, state and other fire protection agencies, including boards of county commissioners of adjoining counties in providing means and methods of safeguarding the range, farm and forest lands within the state and in preventing fire nuisance thereon.

History: En. Sec. 2, Ch. 173, L. 1945.

28-603. Powers of board. (1) Boards of county commissioners may in their discretion establish fire seasons annually during which no person shall ignite or set any forest fire, or slash burning fire, or land clearing fire, or debris burning fire, or any open fire, within any forest, range or crop lands, subject to the provisions of this act, without having obtained an official written permit to ignite or set such fire from a county rural fire chief or from a district rural fire chief authorized by the board to issue such permits for such lands;

(2) Any person who shall ignite or set any forest fire, or slash burning fire, or land clearing fire, or debris burning fire, or any open fire, within any forest, range or crop land subject to the provisions of this act without

first having obtained a written permit to ignite or set such fire shall be guilty of a misdemeanor;

(3) To augment rural crews in case of serious emergency the boards may provide for the organization and training of voluntary urban fire crews to be used in rural areas;

(4) Any county rural fire chief and/or district rural fire chief may enter private property either with or without fire control crews for the purpose of suppressing fires, and are exempt from any damage resulting from such activity;

(5) The board is authorized to appropriate from the general fund of the county not to exceed five thousand dollars (\$5,000.00) per year for the purchase, care and maintenance of fire-fighting equipment, or for the payment of wages to skilled operators of heavy mechanized equipment in the suppression of fires when deemed necessary; or if the general fund is budgeted to the full limit, the board may at any time fixed by law for levy and assessment of taxes levy a tax at such rate as in their judgment will be necessary to raise such needed sum not to exceed five thousand dollars (\$5,000.00).

History: En. Sec. 3, Ch. 173, L. 1945;
amd. Sec. 1, Ch. 40, L. 1955.

28-604. Lands to which applicable. The provisions of this act are not applicable to any organized forest protection district or fire district defined in sections 28-101 to 28-129, or any organized fire protection district organized and operating under other legal authority. This act shall apply to all lands not protected by federal, state, municipal or private protective agencies organized under the laws of the state of Montana.

History: En. Sec. 4, Ch. 173, L. 1945.

TITLE 29

FRAUDULENT CONVEYANCES

- Chapter 1. Uniform fraudulent conveyance act, 29-101 to 29-113.
2. Certain instruments and transfers, when void, 29-201 to 29-210.

CHAPTER 1

UNIFORM FRAUDULENT CONVEYANCE ACT

- Section 29-101. Definition of terms.
29-102. Insolvency.
29-103. Fair consideration.
29-104. Conveyances by insolvent.
29-105. Conveyances by persons in business.
29-106. Conveyances by a person about to incur debts.
29-107. Conveyance made with intent to defraud.
29-108. Conveyance of partnership property.
29-109. Rights of creditors whose claims have matured.
29-110. Rights of creditors whose claims have not matured.
29-111. Cases not provided for in act.
29-112. Construction of act.
29-113. Name of act.

29-101. Definition of terms. In this act "assets" of a debtor means property not exempt from liability for his debts. To the extent that any property is liable for any debts of the debtor, such property shall be included in his assets.

"Conveyance" includes every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or encumbrance.

"Creditor" is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

"Debt" includes any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

History: En. Sec. 1, Ch. 126, L. 1945.

NOTE.—Uniform State Law. Sections 29-101 through 29-113 constitute the "Uniform Fraudulent Conveyance Act" approved by the National Conference of Commissioners on Uniform State Laws in 1918 and adopted in the states of Arizona, California, Delaware, Maryland, Massachusetts, Michigan, Minnesota, Nevada,

New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Dakota, Tennessee, Utah, Washington, Wisconsin and Wyoming.

Cross-Reference

Fraudulent conveyances, criminal liability, secs. 94-2101 to 94-2104.

29-102. Insolvency. (1) A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured.

(2) In determining whether a partnership is insolvent there shall be added to the partnership property the present fair salable value of the separate assets of each general partner in excess of the amount probably sufficient to meet the claims of his separate creditors, and also the amount of any unpaid subscription to the partnership of each limited partner, provided the present fair salable value of the assets of such limited partner is probably sufficient to pay his debts, including such unpaid subscription.

History: En. Sec. 2, Ch. 126, L. 1945.

29-103. Fair consideration. Fair consideration is given for property, or obligation,

(a) When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or

(b) When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.

History: En. Sec. 3, Ch. 126, L. 1945.

Collateral References

Assumption of mortgage as consideration for conveyance attached as in fraud of creditors. 6 ALR 2d 270.

Use of debtor's individual funds or property for acquisition, improvement of, or discharge of liens on property held in estate by entireties as fraud upon creditors. 7 ALR 2d 1104.

Transaction in consideration of discharge of antecedent debt owed by one other than grantor as constituting "fair consideration" under Uniform Fraudulent Conveyance Act. 30 ALR 2d 1209.

Conveyance or transfer in consideration of legal services, rendered or to be rendered, as fraudulent as against creditors. 45 ALR 2d 500.

29-104. Conveyances by insolvent. Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

History: En. Sec. 4, Ch. 126, L. 1945.

29-105. Conveyances by persons in business. Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent.

History: En. Sec. 5, Ch. 126, L. 1945.

Collateral References

Validity of corporation's assignment for benefit of creditors as affected by president's lack of authority from directors to make the same. 10 ALR 2d 713.

Right of purchaser to decline performance of contract for sales of business or goods because of seller's failure to comply with Bulk Sales Law. 24 ALR 2d 1030.

Return of merchandise to original seller in satisfaction of purchase price as transfer violating Bulk Sales Law. 59 ALR 2d 1115.

29-106. Conveyances by a person about to incur debts. Every conveyance made and every obligation incurred without fair consideration when

the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

History: En. Sec. 6, Ch. 126, L. 1945.

29-107. Conveyance made with intent to defraud. Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

History: En. Sec. 7, Ch. 126, L. 1945.

29-108. Conveyance of partnership property. Every conveyance of partnership property and every partnership obligation incurred when the partnership is or will be thereby rendered insolvent, is fraudulent as to partnership creditors, if the conveyance is made or obligation is incurred,

(a) To a partner, whether with or without a promise by him to pay partnership debts, or

(b) To a person not a partner without fair consideration to the partnership as distinguished from consideration to the individual partners.

History: En. Sec. 8, Ch. 126, L. 1945.

29-109. Rights of creditors whose claims have matured. (1) Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser,

(a) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or

(b) Disregard the conveyance and attach or levy execution upon the property conveyed.

(2) A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation, may retain the property or obligation as security for repayment.

History: En. Sec. 9, Ch. 126, L. 1945.

Decedents' Estates

The Uniform Fraudulent Conveyance Act (sections 29-101 to 29-113) does not repeal sections 91-3209, 91-3210, relating to recovery of property transferred by fraudulent conveyances in the lifetime of a decedent whose estate is insolvent. In re Estate of Adkins, 133 M 27, 319 P 2d 512, 515.

Parties to Actions

Although executor or administrator is not a necessary party to an action seeking to set aside an alleged fraudulent conveyance of decedent, he is a proper party and the creditors have the right to resort to sections 91-3209, 91-3210 and cause the

executor or administrator to commence and prosecute such an action. In re Estate of Adkins, 133 M 27, 319 P 2d 512, 515.

Collateral References

Right of creditor to set aside transfer of property as fraudulent as affected by the fact that his claim is barred by the statute of limitations. 14 ALR 2d 598.

Maintenance of action to set aside fraudulent conveyance as dependent upon prior obtaining of judgment, in view of Federal Civil Procedure Rule 18(b) and like state rules or statutes pertaining to joinder in a single action of two claims, although one was previously cognizable only after the other had been prosecuted to a conclusion. 67 ALR 2d 697.

29-110. Rights of creditors whose claims have not matured. Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured he may proceed in a court of competent jurisdiction against any person against whom he could have proceeded had his claim matured, and the court may,

- (a) Restrain the defendant from disposing of his property,
- (b) Appoint a receiver to take charge of the property,
- (c) Set aside the conveyance or annul the obligation, or
- (d) Make any order which the circumstances of the case may require.

History: En. Sec. 10, Ch. 126, L. 1945.

Right of tort claimant, prior to judgment, to attack conveyance or transfer as fraudulent. 73 ALR 2d 749.

Collateral References

Stockholders of corporation which transfers its assets as creditors within Bulk Sales Act. 16 ALR 2d 1315.

29-111. Cases not provided for in act. In any case not provided for in this act the rules of law and equity including the law merchant, and in particular the rules relating to the law of principal and agent, and the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy or other invalidating cause shall govern.

History: En. Sec. 11, Ch. 126, L. 1945.

29-112. Construction of act. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History: En. Sec. 12, Ch. 126, L. 1945.

29-113. Name of act. This act may be cited as the Uniform Fraudulent Conveyance Act.

History: En. Sec. 13, Ch. 126, L. 1945.

CHAPTER 2

CERTAIN INSTRUMENTS AND TRANSFERS, WHEN VOID

- Section 29-201. Certain instruments void against purchasers, etc.
 29-202. Not void against purchaser having notice, unless fraud is mutual.
 29-203. Power to revoke—when deemed executed.
 29-204. Same—deemed executed when entitled to execute.
 29-205. Purchaser in good faith not affected.
 29-206. Other provisions.
 29-207. Transfers, etc., with intent to defraud creditors.
 29-208. Certain transfers presumed fraudulent.
 29-209. Creditor's right must be judicially ascertained.
 29-210. Question of fraud—how determined.

29-201. (6939) Certain instruments void against purchasers, etc. Every instrument, other than a will, affecting an estate in real property, including every charge upon real property, or upon its rents or profits, made with intent to defraud prior or subsequent purchasers thereof, or encumbrancers thereon, is void as against every purchaser or encumbrancer, for value, of the same property, or the rents or profits thereof.

History: Ap. p. Sec. 1, p. 492, Bannack Stat.; re-en. Sec. 1, p. 392, Cod. Stat. 1871; re-en. Sec. 155, 5th Div. Rev. Stat. 1879; re-en. Sec. 212, 5th Div. Comp. Stat. 1887;

amd. Sec. 1650, Civ. C. 1895; re-en. Sec. 4688, Rev. C. 1907; re-en. Sec. 6939, R. C. M. 1921. Cal. Civ. C. Sec. 1227. Field Civ. C. Sec. 535.

Cross-Reference

Bulk sales, secs. 18-201 to 18-205.

Collateral References

Fraudulent Conveyances \hookrightarrow 2-6.
37 C.J.S. Fraudulent Conveyances §§ 4-6.
Generally, see 24 Am. Jur. 155, Fraudulent Conveyances.

Right of creditor to set aside transfer of property as fraudulent as affected by the fact that his claim is barred by the statute of limitations. 14 ALR 2d 598.

29-202. (6940) Not void against purchaser having notice, unless fraud is mutual. No instrument is to be avoided under the last section, in favor of a subsequent purchaser or encumbrancer having notice thereof at the time his purchase was made, or his lien acquired, unless the person in whose favor the instrument was made was a privy to the fraud intended.

History: Ap. p. Sec. 2, p. 492, Bannack Stat.; re-en. Sec. 2, p. 392, Cod. Stat. 1871; re-en. Sec. 156, 5th Div. Rev. Stat. 1879; re-en. Sec. 213, 5th Div. Comp. Stat. 1887; amd. Sec. 1651, Civ. C. 1895; re-en. Sec. 4689, Rev. C. 1907; re-en. Sec. 6940, R. C.

M. 1921. Cal. Civ. C. Sec. 1228. Field Civ. C. Sec. 536.

Collateral References

Fraudulent Conveyances \hookrightarrow 224.
37 C.J.S. Fraudulent Conveyances § 291.

29-203. (6941) Power to revoke—when deemed executed. Where a power to revoke or modify an instrument affecting the title to, or enjoyment of, an estate in real property, is reserved to the grantor, or given to any other person, a subsequent grant of, or charge upon, the estate, by the person having the power of revocation, in favor of a purchaser or encumbrancer for value, operates as a revocation of the original instrument, to the extent of the power, in favor of such purchaser or encumbrancer.

History: Ap. p. Sec. 3, p. 492, Bannack Stat.; re-en. Sec. 3, p. 392, Cod. Stat. 1871; re-en. Sec. 157, 5th Div. Rev. Stat. 1879; re-en. Sec. 214, 5th Div. Comp. Stat. 1887; amd. Sec. 1652, Civ. C. 1895; re-en. Sec. 4690, Rev. C. 1907; re-en. Sec. 6941, R. C. M. 1921. Cal. Civ. C. Sec. 1229. Field Civ. C. Sec. 537.

Collateral References

Fraudulent Conveyances \hookrightarrow 112.
37 C.J.S. Fraudulent Conveyances §§ 223, 288.

Rule denying relief to one who conveyed his property to defraud his creditors as applicable where the threatened claim which occasioned the conveyance was subsequently paid. 21 ALR 2d 593.

29-204. (6942) Same — deemed executed when entitled to execute. Where a person having a power of revocation, within the provisions of the last section, is not entitled to execute it until after the time at which he makes such a grant or charge as described in that section, the power is deemed to be executed as soon as he is entitled to execute it.

History: En. Sec. 1653, Civ. C. 1895; re-en. Sec. 4691, Rev. C. 1907; re-en. Sec.

6942, R. C. M. 1921. Cal. Civ. C. Sec. 1230. Field Civ. C. Sec. 538.

29-205. (6943) Purchaser in good faith not affected. The rights of a purchaser or encumbrancer in good faith and for value are not to be impaired by any of the foregoing provisions of this chapter.

History: En. Sec. 1654, Civ. C. 1895; re-en. Sec. 4692, Rev. C. 1907; re-en. Sec. 6943, R. C. M. 1921. Field Civ. C. Sec. 539.

Collateral References

Fraudulent Conveyances \hookrightarrow 186, 187.
37 C.J.S. Fraudulent Conveyances § 282.

29-206. (6944) Other provisions. Other provisions concerning unlawful transfers are contained in sections 29-207 to 29-210 and 18-201 to 18-205, concerning the special relations of debtor and creditor.

History: En. Sec. 1655, Civ. C. 1895; 6944, R. C. M. 1921. Cal. Civ. C. Sec. 1231. re-en. Sec. 4693, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 541.

29-207. (8603) Transfers, etc., with intent to defraud creditors. Every transfer of property or charge thereon made, every obligation incurred, every judicial proceeding taken, and every act performed, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their representatives or successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor.

History: En. Sec. 4490, Civ. C. 1895; re-en. Sec. 6127, Rev. C. 1907; re-en. Sec. 8603, R. C. M. 1921. Cal. Civ. C. Sec. 3439. Field Civ. C. Sec. 1918.

Badges of Fraud

Since a fraudulent intent in the transfer of property to defeat claims of creditors is the result of mental process, generally the only means by which to ascertain whether such intent existed at the time of the complained-of transfer is by considering the acts of the party which experience has demonstrated to have fraudulent aspects, denominated "badges of fraud," such as insolvency, inadequacy of consideration, etc. *Security State Bank v. McIntyre*, 71 M 186, 196, 228 P 618.

While a person may do with his property as he sees fit, sell it for less than it is worth or give it away even though he is indebted or even insolvent, where fraud enters into the transaction and the rights of creditors are affected, insolvency of the grantor and gross inadequacy of consideration are badges of fraud, and though the relationship of husband and wife is not a badge of fraud, transactions between them, because of the opportunity for fraud, are subject to the most rigid scrutiny, and the fact of such relationship, with other evidence, may be considered as reflecting the intention with which the transfer was made. *First National Bank v. Conner*, 85 M 229, 239, 278 P 143.

"Creditors"

The fact that a creditor did not extend credit to the maker of a promissory note because of the apparent ownership of the particular property does not defeat the creditor's right to question the good faith of the transfer, the term "creditor" as used in this section embracing all creditors without limitation other than that prescribed by section 29-209, i. e., that the creditor must be one who by the transfer is obstructed from enforcement of his right to take the property by legal proc-

ess. *Ferrell v. Elling*, 84 M 384, 391, 392, 276 P 432.

Declaratory of Common Law

This section is but declaratory of the common law. The transfer therein denounced as void is so only as to, and at the instance of, creditors having liens or charges upon, or special interest in, the property transferred. *Westheimer v. Goodkind*, 24 M 90, 103, 60 P 813.

Effect of Mortgage Given Four Months Prior to Bankruptcy

Mortgages and leases executed by a corporation to secure past indebtedness and future advances more than four months prior to the filing of a petition in bankruptcy were not voidable under the federal Bankruptcy Act, as having been given for the purpose of hindering, delaying and defrauding its creditors, under this section. *Godfrey L. Cabot, Inc. v. Gas Products Co.*, 93 M 497, 509, 19 P 2d 878.

Insolvency Required

Under this section and sections 29-209 and 29-210, a creditor seeking to set aside a transfer as fraudulent must allege and prove that the debtor was insolvent at the time he made the conveyance and that he had no other property out of which his claim could be satisfied or enforced by legal process. *Hale et al. v. Belgrade Co., Ltd.*, et al., 75 M 99, 109, 242 P 425.

Intent Presumed

Where one makes a voluntary conveyance of his property without retaining sufficient to satisfy the legal demands of his creditors, plaintiff is not required to show the existence of an actual fraudulent intent, the law presuming that by her voluntary act she intended the natural and inevitable consequences to flow therefrom, to wit, to hinder, delay or defraud the plaintiff in the collection of his judgment secured after the conveyance, the result being fraud in fact. *National Bank of*

Anaconda v. Yegen, 83 M 265, 280, 271 P 612.

Liberal Construction in Favor of Creditors

Courts look with disfavor upon conveyances between relatives when they are a fraud upon creditors, and therefore construe statutes of the character of this section, declaring void transfers made with intent to defraud creditors, liberally so as to include within their protection all persons who have interests of which they may be defrauded. Ferrell v. Elling, 84 M 384, 391, 392, 276 P 432.

Persons Given Benefit of Statute

This section authorizing the setting aside of fraudulent conveyances, does not inure to the benefit of creditors alone, but also includes transfers and obligations incurred with intent to defraud "other persons" of their demands; the section includes within its provisions all persons who have interests in the property of which they may be defrauded. Humbird et al. v. Arnet et al., 99 M 499, 511, 44 P 2d 756.

Property of Debtor's Spouse

In an action by a judgment creditor to enforce a judgment lien against real property standing of record in the name of the wife of the judgment debtor, in order for plaintiff to establish a prima facie case under either of the theories expressed in sections 29-207 or 86-103, it must be proved that funds belonging to the husband judgment debtor were used for the purchase of the property. Beard v. Myers, — M —, 347 P 2d 719.

References

Cited or applied as section 4490, Civil Code, in Babcock v. Maxwell, 29 M 31, 35, 74 P 64; Williams v. Gray, 61 M 1, 12, 203 P 524; Newman v. Association of Credit Men, 63 M 545, 208 P 914; Wray v. Great Falls Paper Co., 72 M 461, 470, 234 P 486; Edenfield v. C. V. Seal Co., Inc., et al., 83 M 49, 58, 270 P 642.

Collateral References

Fraudulent Conveyances ⇨ 64.
37 C.J.S. Fraudulent Conveyances § 110.
24 Am. Jur. 165-295, Fraudulent Conveyances, §§ 5-161.

Remedy of general creditor or judgment creditor as affected by Uniform Fraudulent Conveyance Act. 65 ALR 251 and 119 ALR 949.

Absolute conveyance or transfer with secret reservation as fraudulent per se as against creditors. 68 ALR 306.

Principle which denies relief to party who has conveyed or transferred property in fraud of his creditors, as affected by execution, as part of, or as contemplated at time of, the fraudulent transaction, of reconveyance or retransfer of the property to him. 89 ALR 1166.

Uniform Fraudulent Conveyance Act as applied to conveyance between third persons, upon consideration furnished by debtor. 91 ALR 741.

Right to set aside, for benefit of heirs and distributees, a conveyance or transfer by deceased in fraud of his creditors. 148 ALR 230.

Rights as between creditors of grantor or transferrer and those of grantee or transferee in respect of property conveyed or transferred in fraud of creditors. 148 ALR 520.

Resumption of marital relations as consideration. 149 ALR 1012.

Purchase of homestead as fraud on creditors. 161 ALR 1287.

Use of debtor's individual funds or property for acquisition, improvement of, or discharge of liens on, property held in estate by entiresies as fraud upon creditors. 7 ALR 2d 1104.

Rule denying relief to one who conveyed his property to defraud his creditors as applicable where the threatened claim which occasioned the conveyance was paid or was never established. 21 ALR 2d 589.

29-208. (8604) Certain transfers presumed fraudulent. Every transfer of personal property, other than a thing in action, or a ship or cargo at sea, or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in

trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer.

History: En. Sec. 4491, Civ. C. 1895; re-en. Sec. 6128, Rev. C. 1907; re-en. Sec. 8604, R. C. M. 1921. Cal. Civ. C. Sec. 3440. Field Civ. C. Sec. 1919.

Constructive Possession

This section does not speak of actual possession, but of actual change of possession. Legal possession may be either actual or constructive. *Dover Lumber Co. v. Whitecomb*, 54 M 141, 151, 168 P 947.

A transfer of logs to a lumber company is valid as against an attaching creditor of the seller where there was a constructive delivery of the logs to the company, followed by an actual and continued change of possession. *Dover Lumber Co. v. Whitecomb*, 54 M 141, 151, 168 P 947.

The requirements of this section are satisfied in a transaction involving the sale of a large number of logs, where it appears that there was an actual change of dominion by marking the logs in such a manner as to indicate that the property was in the hands of the new owner, judging from the situation of the parties. *Dover Lumber Co. v. Whitecomb*, 54 M 141, 148, 168 P 947.

Continued Possession

A continued change of possession of livestock for a period of five months was sufficient to satisfy the requirements of this section; it is sufficient that there was a change of possession for a reasonable length of time, that is, such a period of time as will preclude the idea that the sale was a colorable one. *Chestnut v. Sales*, 44 M 534, 543, 121 P 481.

While a mere temporary change of possession of personal property will not avail against the claim of a creditor of the vendor, the change need not necessarily continue until the property is seized by the creditor, but if the change was open and so long continued as to indicate to the world at large that there has been a transfer of title, it is sufficient. *Puckett v. Hopkins et al.*, 63 M 137, 140, 206 P 422.

Creditor's Right

In a creditor's suit to set aside a sale of sheep as fraudulent because there was no continued change of possession, where only a part of them remained in the possession of the purchaser at the time the creditors secured their lien, a judgment that the purchaser should deliver to the sheriff, for the benefit of the creditors, all the sheep purchased, or account for their proceeds, was erroneous, since the purchaser was liable only for the identical chattels remaining in his possession at the

time the creditor's lien attached. *Finch v. Kent*, 24 M 268, 275, 61 P 653.

By this section the legislature did not intend to go further than to declare that, during the time the vendor of personal property remains in possession after sale, his creditors may seize the property in satisfaction of their claims, notwithstanding such sale. *Western Mining Supply Co. v. Quinn*, 40 M 156, 166, 105 P 732.

Delay in Delivery

The fact that property was sold on one day, and not delivered until the next, does not render the sale void, if delivery was impossible on the day of sale; and it is properly a question for the jury to answer, whether the property was so situated, and the parties were so located at the time of sale, that instant delivery could not be made, and whether it was made as soon thereafter as practicable. *O'Gara v. Lowry*, 5 M 427, 432, 5 P 583.

Effect as to Assignee for Benefit for Creditors

A transfer by a debtor of property not accompanied by change of possession is not void as against the assignee for the benefit of the debtor's creditors under this section, as the estate does not "devolve" by such assignment, but is granted by it. *Babcock v. Maxwell*, 29 M 31, 35, 74 P 64.

Effect of Delivery and Nondelivery of Possession

While title to personal property may pass by bargain and sale without delivery of possession as between the parties to the transaction, as against every one but the seller, there must be a delivery of the possession. As a general rule, where the same personalty is sold to two different persons by transfer equally valid as between the seller and buyer, he who first lawfully acquires the possession will hold it against the other. Where plaintiff in a claim and delivery action, in good faith bought and paid for a band of horses and accepted delivery, he acquired title notwithstanding another had dealt and paid part of the price. *Jackson v. McDonald*, 115 M 269, 274, 143 P 2d 898.

Effect on Mortgages

A mortgage of personal property and transfer thereunder are void against a trustee in bankruptcy where the mortgage was made more than fourteen months prior to the transfer. *Stewart v. Hoffman*, 31 M 184, 189, 77 P 689.

In this state all personal property may be mortgaged; therefore, the words "when allowed by law," as appearing in this section, are superfluous. Disregarding the phrase "when allowed by law," all mortgages of personal property are exempted from the operation of the section. *Stewart v. Hoffman*, 31 M 190, 191, 81 P 3.

Where alleged transfer of mares to plaintiff in exchange for other animals was not accompanied by immediate delivery and was not followed by actual and continued change of possession, transfer was conclusively presumed to be fraudulent and void as against holders in good faith of subsequently executed notes and chattel mortgage and against sheriff acting at direction of holders and pursuant to terms of mortgage. *Reagan v. Armstrong*, 118 M 273, 165 P 2d 1004, 1006.

Employment of Vendor by Vendee

The fact that the vendee of a horse and wagon employed the brother of the vendor to drive it, and, subsequently, for a short time, employed the vendor, does not show such a want of continued possession in the vendee as to render the sale void. *O'Gara v. Lowry*, 5 M 427, 432, 5 P 583.

Evidence Not Admissible to Disprove Fraud in Law

In an action in claim and delivery based upon constructive fraud in a sale of personal property under this section, testimony offered by the buyer that the bill of sale evidencing the transaction had been filed with the county clerk, and that he had made application for insurance on the property in his own name, was properly refused, since such evidence could reflect only upon the good faith of the parties to the sale, and this is an immaterial matter in an action in which fraud in law is relied upon. *Taylor v. Malta Mercantile Co.*, 47 M 342, 346, 132 P 549.

Execution against Property

Where there has been a sale of personal property not accompanied by an immediate delivery, and followed by an actual and continued change of possession, the vendee takes title subject to the claim of the vendor's creditor, who may subject the property to execution. *Tetrault v. Ingraham*, 54 M 524, 528, 171 P 1148.

Growing Crops

Where grain was sold before harvesting and delivered to the elevator for purchaser as soon after harvesting as practicable, title passed upon delivery to the warehouseman. *Claypool v. Malta Standard Garage*, 96 M 285, 287 et seq., 30 P 2d 89.

Husband and Wife

It is a serious question as to whether

this section is applicable to a transfer of personal property between husband and wife. *Webster v. Sherman*, 33 M 448, 457, 84 P 878.

Insolvency at Time of Transfer Not Required

In an action in claim and delivery by the purchaser of a band of horses ranging on public lands and seized by a trustee in bankruptcy at the instance of the principal creditor of the bankrupt vendor, in whose possession they apparently remained until seizure, it was immaterial that it was not shown that vendor was in debt at the time of the alleged sale; as against his creditors or the trustee in bankruptcy, the sale was void under this section. *Anderson v. Hoffman*, 99 M 146, 149, 43 P 2d 644.

Instructions to Jury

Instructions on question of whether or not a sale of personal property was accompanied by immediate delivery, and followed by an actual and continued change of possession of the chattels, were not erroneous in view of the charge taken as a whole. *Morris v. McLaughlin*, 25 M 151, 153, 64 P 219.

Joint Owner in Possession

Where a joint owner of personal property, in the possession of another joint owner, sells his interest, the failure of the purchaser to take possession does not, as against execution creditors of the seller, avoid the sale. The presumption referred to in this section is to be indulged only where the person making the transfer has at the time the possession or control of the property. *Yank v. Bordeaux*, 23 M 205, 209, 58 P 42.

Judicial Sales

This section does not apply to judicial sales. *Kerr v. Blaine*, 49 M 602, 605, 144 P 566.

A sale of personal property by a sheriff under a provision in a chattel mortgage authorizing him, among other things, to sell the property, in case default should be made in the payment of the principal or interest, is not a judicial sale, but falls within the letter and spirit of this section. *Kerr v. Blaine*, 49 M 602, 606, 144 P 566. See *Banking Corp. of Montana v. Hein*, 52 M-238, 241, 156 P 1085.

Purpose of Statute

The object of this section is to require notice to the world of the transfer of personal property in order that creditors, and purchasers or encumbrancers in good faith, may be protected, and to prevent fraud; it requires surrender of control over the property by the vendor and the assumption of

possession by the vendee, mere words being insufficient to constitute delivery. *O. W. Perry Co. v. Mullen*, 81 M 482, 263 P 976; *Brown v. Federal Surety Co.*, 91 M 389, 399, 8 P 2d 647.

Question of Fact

In a case where the evidence is conflicting, it is for the jury to say whether there was any such immediate delivery and actual and continued change of possession as to satisfy this section. *Western Mining Supply Co. v. Melzner*, 48 M 174, 177, 136 P 44.

In an action on a sheriff's bond in which the defense was that the property seized had been sold by the judgment debtor with the intent to defraud the creditor, where the evidence was conflicting as to whether there was such an immediate delivery and continued change of possession as to satisfy the requirements of this section, the question was one for the jury to determine. *Tomeheck v. Maryland Casualty Co.*, 75 M 557, 565, 244 P 506.

Whether in a given case of transfer of personal property there has been an immediate delivery and actual possession in the vendee of the thing sold depends, in a measure, upon the character of the article sold, the nature of the transaction, the position of the parties and the intended use of the property, each case being dependent upon its own facts. *O. W. Perry Co. v. Mullen*, 81 M 482, 263 P 976.

Whether at the time of sale of grain instant delivery could not be made, whether it was made as soon thereafter as practicable and whether there was a sufficient change of possession to constitute a delivery passing title within the meaning of this section, are ordinarily questions for the jury's determination. *Claypool v. Malta Standard Garage*, 96 M 285, 287 et seq., 30 P 2d 89.

Range Animals

Where the vendors drove all their horses, which were branded alike, into a corral, and after horses sold to a purchaser had been selected from the corral, branded with a bar under the previous brand, and turned loose with other horses "on the range," and the vendors executed a bill of sale for the horses purchased, there was an immediate delivery. *Dodge v. Jones*, 7 M 121, 126, 14 P 707. See *Taylor v. Malta Mercantile Co.*, 47 M 342, 350, 132 P 549; *Dover Lumber Co. v. Whitcomb*, 54 M 141, 149, 168 P 947.

Where one purchases a herd of range cattle with the brand, but delivery of only a portion thereof is actually made, the vendee may not recover those not delivered from a subsequent purchaser in good faith, under an alleged custom among

cattlemen that one buying an entire herd of such cattle with their brand, some of which are not actually delivered, becomes the owner of those not delivered. *Ettien v. Drum*, 32 M 311, 317, 80 P 369.

Sufficiency of Evidence

Evidence sufficient to show that a sale was followed by an immediate delivery and actual change of possession. *Chestnut v. Sales*, 44 M 534, 543, 121 P 481.

Evidence insufficient to prove such an immediate delivery, either manual or symbolic, of property consisting of sheep-shearing machinery, frame buildings, etc., or an actual and continued change of possession as to meet the requirements of this section. *Taylor v. Malta Mercantile Co.*, 47 M 342, 349, 132 P 549.

Surety as Creditor

In an action by an alleged vendee of the tools and equipment of a road construction subcontractor against the latter's surety to recover rental for the use of the equipment by the surety in completing the work on default of the subcontractor, evidence showed that the transfer was fraudulent in law under the provisions of this section, and void as against the surety, a "creditor" within the meaning of this section. *Brown v. Federal Surety Co.*, 91 M 389, 399, 8 P 2d 647.

Warehouse Contents

The delivery of the key to a warehouse, standing on leased ground, which, together with its contents, consisting of heavy machinery, lumber, etc., had been sold to plaintiff, constituted a sufficient delivery of the property sold, so as to prevent the presumption that the sale was fraudulent, the vendor not having exercised any act of ownership or control over any of the property thereafter. *Western Mining Supply Co. v. Quinn*, 40 M 156, 160, 105 P 732.

The mere statement, "It is yours," made with reference to a quantity of grain by the transferor to the transferee in an attorney's office miles away from where the grain was stored, the transferee doing nothing whatever to take possession, which remained in the transferor, was not such a delivery as is contemplated by this section, and therefore insufficient as against an attaching creditor of the transferor. *Wells et al. v. Esgar*, 72 M 333, 336, 233 P 123.

References

Cited or applied as section 169, Fifth Division, Revised Statutes of 1879, in *Botcher v. Berry*, 6 M 448, 13 P 45; as section 4491, Civil Code, in *Ettien v. Drum*, 35 M 81, 86, 88 P 659; as section 6128, Revised Codes, in *Olcott v. Gebo*,

54 M 35, 38, 166 P 300; First Nat. Bk. v. Montana Emporium Co., 59 M 584, 593, 197 P 994; Security State Bank v. McIntyre, 71 M 186, 196, 228 P 618.

Collateral References

Fraudulent Conveyances \Rightarrow 132.
37 C.J.S. Fraudulent Conveyances § 187.

29-209. (8605) Creditor's right must be judicially ascertained. A creditor can avoid the act or obligation of his debtor for fraud only where the fraud obstructs the enforcement, by legal process, of his right to take the property affected by the transfer or obligation.

History: En. Sec. 4492, Civ. C. 1895; re-en. Sec. 6129, Rev. C. 1907; re-en. Sec. 8605, R. C. M. 1921. Cal. Civ. C. Sec. 3441. Field Civ. C. Sec. 1922.

Ltd., et al., 75 M 99, 109, 242 P 425; Ferrell v. Elling, 84 M 384, 276 P 432.

References

Edenfield v. C. V. Seal Co., Inc., et al., 83 M 49, 61, 270 P 642; First National Bank v. Conner, 85 M 229, 239, 278 P 143.

Collateral References

Fraudulent Conveyances \Rightarrow 205.
37 C.J.S. Fraudulent Conveyances § 61.

Insolvency Required for Avoidance

Under this section and sections 29-207 and 29-210, a creditor seeking to set aside a transfer as fraudulent must allege and prove that the debtor was insolvent at the time he made the conveyance and that he had no other property out of which his claim could be satisfied or enforced by legal process. Hale et al. v. Belgrade Co.,

Necessary parties defendant to action to set aside conveyance in fraud of creditors. 24 ALR 2d 395.

29-210. (8606) Question of fraud—how determined. In all cases arising under the provisions of this chapter, except as otherwise provided in section 29-208, the question of fraudulent intent is one of fact and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration.

History: En. Sec. 4493, Civ. C. 1895; re-en. Sec. 6130, Rev. C. 1907; re-en. Sec. 8606, R. C. M. 1921. Cal. Civ. C. Sec. 3442. Field Civ. C. Sec. 1923.

618; Hale et al. v. Belgrade Co., Ltd., et al., 75 M 99, 109, 242 P 425; National Bank of Anaconda v. Yegen, 83 M 265, 280, 271 P 612; Ferrell v. Elling, 84 M 384, 388, 276 P 432.

References

Cited or applied as section 6130, Revised Codes, in Taylor v. Malta Mercantile Co., 47 M 342, 346, 132 P 549; Security State Bank v. McIntyre, 71 M 186, 196, 228 P

Collateral References

Fraudulent Conveyances \Rightarrow 74(1).
37 C.J.S. Fraudulent Conveyances § 163.

TITLE 30

GUARANTY, INDEMNITY AND SURETYSHIP

- Chapter 1. Guaranty—definition, creation and interpretation, 30-101 to 30-110.
2. Guarantors—liability and exoneration, 30-201 to 30-214.
3. Indemnity, 30-301 to 30-308.
4. Suretyship—sureties and their liability, 30-401 to 30-407.
5. Rights of sureties and creditors, 30-501 to 30-508.
6. Letters of credit, 30-601 to 30-609.

CHAPTER 1

GUARANTY—DEFINITION, CREATION AND INTERPRETATION

- Section 30-101. Guaranty defined.
30-102. Knowledge of principal not necessary to creation of guaranty.
30-103. Necessity of a consideration.
30-104. Guaranty to be in writing, etc.
30-105. Engagement to answer for obligation of another—when deemed original.
30-106. Acceptance of guaranty.
30-107. Guaranty of incomplete contract.
30-108. Guaranty that an obligation is good or collectible.
30-109. Recovery upon such guaranty.
30-110. Guarantor's liability upon such guaranty.

30-101. (8171) Guaranty defined. A guaranty is a promise to answer for the debt, default, or miscarriage of another person.

History: En. Sec. 3600, Civ. C. 1895; re-en. Sec. 5656, Rev. C. 1907; re-en. Sec. 8171, R. C. M. 1921. Cal. Civ. C. Sec. 2787. Field Civ. C. Sec. 1534.

Distinction Between Accommodation Maker and Guarantor

Where defendant signed a renewal note taking the place of a note signed by her husband and another, at the request of the husband for the purpose of lending her name to him as comaker, she was an accommodation maker within the meaning of section 55-306, and not a guarantor, and liable as such to a holder for value though the latter knew her to be only an accommodation maker and that no consideration moved to her for signing it, the consideration moving to one or both of her comakers having been sufficient to uphold the note. *Mulany v. Murray*, 68 M 245, 251, 216 P 1105.

Distinction Between Indemnity and Guaranty

Where, for the purpose of inducing the purchase of corporate stock, the seller gave the buyer a promissory note payable in three years, the back of which bore the endorsement that when the stock had paid dividends to the amount of the purchase

price, the note should be void, the agreement, evidenced by the note and endorsement, was one of indemnity within the meaning of section 52-202, and not of guaranty. *Peterson v. Nelson*, 77 M 539, 549, 252 P 368.

Distinction Between "Special" and "General" Guaranty

A special guaranty is one addressed to a particular person who alone can take advantage of it and to whom only the guarantor can be held responsible; a general guaranty is for acceptance by the public generally, i. e., a promise to anyone accepting it to be answerable for a debt or duty in case of the failure or default of another who is liable in the first instance. In the instant case the insolvency and direct suit clause under an oral insurance contract for public liability was neither, its primary intent being to protect the insured rather than the third person—indemnity, not guaranty. *Austin v. New Brunswick Fire Insurance Co.*, 111 M 192, 197, 108 P 2d 1036.

Distinction Between Surety and Guarantor

A surety is bound with the principal as an original promisor on the same contract,

while a guarantor makes his own separate contract; a surety makes his contract primarily for the principal, while a guarantor makes his contract mainly for his own benefit. *Cole Mfg. Co. v. Morton*, 24 M 58, 62, 60 P 587.

A bond in which the sureties unconditionally agreed to indemnify a county treasurer for failure of a bank to pay over to him on demand any funds he might have on deposit therein was a contract of surety and not of guaranty, by which they bound themselves to pay a fixed and definite sum not exceeding that named in the bond, to wit, the amount on deposit—a contract for the direct payment of money. *State ex rel. Barnett v. Reynolds et al.*, 68 M 572, 576, 220 P 525.

Under a contract of guaranty the promisor is bound independently of the person for whose benefit it is made, his engagement being a collateral undertaking; hence there being neither privity of contract, mutuality nor joint liability between the principal debtor and the guarantor, they cannot be joined as defendants; under that of suretyship the surety is bound as an original promisor and the creditor may bring his action jointly against him and the debtor. *Butte Mach. Co. v. Carbonate Hill Mill. Co.*, 75 M 167, 169, 242 P 956.

A contract of guaranty "is a promise to answer for the debt, default or miscarriage of another person" (this section). But it is distinguishable from one of surety, in that the former is a separate contract whereby the promisor is bound independently of the person for whose benefit it is made, while the latter is a contract whereby the promisor is bound jointly with the principal on the same contract. (*Emerson-Brantingham Imp. Co. v. Raugstad*, 65 M 297, 211 P 305.) *Anderson v. Border et al.*, 75 M 516, 525, 244 P 494.

Nature of Contract of Guaranty

Although the contract of guaranty is collateral to the contract of the principal debtor, the two are distinct and independent, there being, as to the contract of guaranty, no privity, mutuality or joint liability between the principal debtor and

his guarantor. *Baroch v. Greater Montana Oil Co.*, 70 M 93, 96, 225 P 800.

Stockholder Liability Is in Nature a Guaranty

The double liability to the creditors of an insolvent state bank imposed by section 6036, R. C. M. 1921, since repealed, as amended by chapter 9, Laws of 1923, upon a holder of stock in such bank, is in the nature of a guaranty, and therefore will not support an attachment as upon a contract for the direct payment of money in an action by the receiver to collect an assessment levied upon the stock of a delinquent stockholder. *Muri v. Young*, 75 M 213, 218, 245 P 956.

The statutory liability imposed upon holders of bank stock by section 6036, R. C. M. 1921, since repealed, for debts of a bank, is in the nature of a guaranty—not primary, but secondary—and, within the meaning of section 93-2715, providing that actions to recover on such liability must be brought within three years after the liability "was created," the liability was created, not when the statute imposing it was enacted, nor when the relation of debtor and creditor between the bank and plaintiff first arose, but when the bank became insolvent; therefore the complaint in such an action showing on its face that it was commenced within the three-year period was sufficient as against a general demurrer. *Mitchell v. Banking Corporation of Mont.*, 83 M 581, 595, 273 P 1055.

References

Square Butte State Bank v. Ballard, 64 M 554, 560 et seq., 210 P 889; *Outlook F. E. Co. v. American S. Co.*, 70 M 8, 223 P 905; *Northwestern F. & M. Ins. Co. v. Pollard*, 74 M 142, 150, 238 P 594; *First Nat. Bank v. Hergert et al.*, 94 M 197, 202, 22 P 2d 169; *Jackson v. Thelen*, 96 M 177, 29 P 2d 646.

Collateral References

Guaranty—1.
38 C.J.S. Guaranty § 2.
See 24 Am. Jur. 869, Guaranty, generally.

30-102. (8172) Knowledge of principal not necessary to creation of guaranty. A person may become guarantor even without the knowledge or consent of the principal.

History: En. Sec. 3601, Civ. C. 1895; re-en. Sec. 5657, Rev. C. 1907; re-en. Sec. 8172, R. C. M. 1921. Cal. Civ. C. Sec. 2788. Field Civ. C. Sec. 1535.

Collateral References

Guaranty—1.
38 C.J.S. Guaranty § 15.

30-103. (8173) Necessity of a consideration. Where a guaranty is entered into at the same time with the original obligation, or with the acceptance of the latter by the guarantee, and forms with that obligation a

part of the consideration to him, no other consideration need exist. In all other cases there must be a consideration distinct from that of the original obligation.

History: En. Sec. 3610, Civ. C. 1895; re-en. Sec. 5658, Rev. C. 1907; re-en. Sec. 8173, R. C. M. 1921. Cal. Civ. C. Sec. 2792. Field Civ. C. Sec. 1536.

Simultaneous Delivery of Instruments

Where a promissory note was not accepted until a guaranty was produced about a week after the execution of the note, and the two instruments were delivered together, plaintiff in an action on the guaranty was not required to show an independent consideration for it, a showing of consideration for the note having been sufficient under this section. *Schauer v. Morgan et al.*, 67 M 455, 464, 216 P 347.

Sufficiency of Consideration

The guaranty must be based upon a consideration (this section). By both the pleading and proof the consideration is forbearance to sue or to take steps to collect the notes or the extension thereof. Forbearance to enforce a legal right is a sufficient consideration to support a contract. *Doorly v. Goodman*, 71 M 529, 537, 230 P 779.

Before plaintiff manufacturing company would enter into a renewal contract with a distributor of its goods, it required him to furnish a written contract of guaranty signed by responsible parties agreeing to pay the company on termination of the renewal contract the amount due it from the distributor at the time of the execution of the guaranty or what might become due thereafter; in consideration it promised to furnish the distributor with more goods. The guaranty was furnished,

no further goods, however, being there-after ordered. Held, in an action to recover on the guaranty, that there was a sufficient consideration to support the contract of guaranty of the distributor's indebtedness existing at the time of the execution of the contract, to wit, extension of time of payment, and that, in addition, the agreement as to payment of existing and future indebtedness, being indivisible, was based upon the further consideration that the company would sell more goods to the distributor, the fact that he thereafter did not order more goods not affecting its sufficiency. *W. T. Rawleigh Co. v. Washburn et al.*, 80 M 308, 316 et seq., 260 P 1039.

A contract of guaranty is made for the benefit of the guarantor, mainly, and if made at the same time as the original obligation, no other consideration need exist. *Lyon v. Featherman*, 80 M 504, 512, 261 P 268.

Suretyship Distinguished

The codes preserve the general distinction between suretyship and guaranty, which is that a surety is bound with the principal as an original promisor on the same contract, while the guarantor makes his own separate contract. This section was enacted with regard to this distinction. *Cole Mfg. Co. v. Morton*, 24 M 58, 61, 60 P 587.

Collateral References

Guaranty \S 14, 16(3).
38 C.J.S. Guaranty $\S\S$ 23, 26.
24 Am. Jur. 905, Guaranty, $\S\S$ 48 et seq.

30-104. (8174) Guaranty to be in writing, etc. Except as prescribed by the next section, a guaranty must be in writing, and signed by the guarantor; but the writing need not express a consideration.

History: En. Sec. 3611, Civ. C. 1895; re-en. Sec. 5659, Rev. C. 1907; re-en. Sec. 8174, R. C. M. 1921. Cal. Civ. C. Sec. 2793. Field Civ. C. Sec. 1537.

Guaranty Imposed by Law Need Not be in Writing

Where a liability in the nature of a guaranty is imposed by law, it does not fall within the provision of this section, requiring a contract of guaranty to be in writing. *Muri v. Young*, 75 M 213, 218, 245 P 956.

Collateral References

Frauds, Statute of \S 13; Guaranty \S 10.
37 C.J.S. Frauds, Statute of \S 12; 38 C.J.S. Guaranty \S 20.

Construction of statute requiring representations as to credit, etc., of another to be in writing. 32 ALR 2d 743.

Promise by stockholder, officer, or director to pay debt of corporation. 35 ALR 2d 906.

Applicability of statute of frauds to promise to pay for medical, dental, or hospital services furnished another. 64 ALR 2d 1071.

30-105. (8175) Engagement to answer for obligation of another—when deemed original. A promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing:

1. Where the promise is made by one who has received property of another upon an undertaking to apply it pursuant to such promise; or by one who has received a discharge from an obligation, in whole or in part, in consideration of such promise.

2. Where the creditor parts with value, or enters into an obligation, in consideration of the obligation in respect to which the promise is made, in terms or under circumstances such as to render the party making the promise the principal debtor, and the person in whose behalf it is made, his surety.

3. Where the promise, being for an antecedent obligation of another, is made upon the consideration that the party receiving it cancels the antecedent obligation, accepting the new promise as a substitute therefor, or upon the consideration that the party receiving it releases the property of another from a levy, or upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person.

4. Where a factor undertakes, for a commission, to sell merchandise and guarantee the sale.

5. Where the holder of an instrument for the payment of money, upon which a third person is or may become liable to him, transfers it in payment of a precedent debt of his own, or for a new consideration, and in connection with such transfer enters into a promise respecting such instrument.

History: En. Sec. 3612, Civ. C. 1895; re-en. Sec. 5660, Rev. C. 1907; re-en. Sec. 8175, R. C. M. 1921. Cal. Civ. C. Sec. 2794. Field Civ. C. Sec. 1538.

Consideration Necessary

The consideration which, under subdivision 3 of this section, will convert a promise to answer for the obligation of a third person into an original obligation of the promisor, so as to take it out of the statute of frauds, must be one tangible at law, a legal, pecuniary benefit, rather than a moral or sentimental purpose. *Bennighoff v. Robbins*, 54 M 66, 76, 166 P 687.

Oral Agreement by Husband to Pay Wife's Attorney to Bring About Reconciliation

An oral agreement between the husband and his wife's attorney to pay for the latter's services in an action for separate maintenance in case he brought about a reconciliation, was an original undertaking within the meaning of subdivisions 1 and 2, this section, and not a guaranty, and therefore not void under the statute of frauds. *Walker v. Hill*, 90 M 111, 121, 300 P 260.

Oral Obligation to Pay Antecedent Obligation of Another

When the original debt was antecedently contracted and subsists, the promise to pay it is original if founded upon a new consideration moving to the promisor, and beneficial to him, and such that the promisor thereby comes under an independent duty of payment, irrespective of the liability of the principal debtor. *McCormick v. Johnson*, 31 M 266, 270, 78 P 500.

A promise by partners to pay an existing debt of a corporation to another in consideration of such other person giving them an agency for sale of his coal is an original obligation, which, under subdivision 3 of this section, need not be in writing. *McCormick v. Johnson*, 31 M 266, 270, 78 P 500.

Where a promise is made to pay the antecedent obligation of another upon the condition that the party receiving it will cancel the obligation, accepting the new promise in substitution therefor, it is an original undertaking or agreement and not a mere promise to answer for the debt of another within the meaning of the statute of frauds, and need not be in writ-

ing. *Tannhauser v. Shea*, 88 M 562, 295 P 268.

Oral Promise to Pay Where Promisor Has Received Property

Where, upon the winding up of a co-partnership of which defendant was a member, he retained certain partnership funds and agreed to pay plaintiff a debt due him for wages from the firm, defendant's promise was upon a consideration beneficial to himself, and was valid though not in writing. *Carlson v. Barker*, 36 M 486, 492, 93 P 646.

Original Promise Within the Meaning of This Section

A promise to answer for the obligation of another is to be deemed the original obligation of the promisor when the creditor parts with value in terms, or under circumstances, such as put the promisor in the attitude of principal debtor, and the person he promises for in the attitude of surety. Such terms or circumstances do not appear where a person introduces strangers to a storekeeper and says, "If they don't pay, I will." *Fortman v. Leggerini*, 51 M 238, 244, 152 P 33.

Where two directors of a corporation in

need of financial aid orally agreed with each other that each would answer to the other for advances made by each to it, provided things could not be so arranged that both should be made whole by the corporation, neither became a principal debtor to the other, and the agreement was not taken out of subdivision 2 of this section, since credit was not given to the promisor exclusively. *Bennighoff v. Robbins*, 54 M 66, 76, 166 P 687.

Where a merchant would not sell merchandise to a sugar-beet grower unless plaintiff bank promised to pay therefor, its promise to do so made it the principal debtor and constituted an "original obligation" within the meaning of this section, not required to be in writing. *First Nat. Bank v. Hergert et al.*, 94 M 197, 203, 22 P 2d 169.

References

Cited or applied as section 5660, Revised Codes, in *McGowan Commercial Co. v. Midland Coal & Lumber Co.*, 41 M 211, 225, 108 P 655.

Collateral References

Frauds, Statute of \S 23 et seq.
37 C.J.S. Frauds, Statute of \S 16.

30-106. (8176) Acceptance of guaranty. A mere offer to guaranty is not binding until notice of its acceptance is communicated by the guarantee to the guarantor; but an absolute guaranty is binding upon the guarantor without notice of acceptance.

History: En. Sec. 3613, Civ. C. 1895; re-en. Sec. 5661, Rev. C. 1907; re-en. Sec. 8176, R. C. M. 1921. Cal. Civ. C. Sec. 2795. Field Civ. C. Sec. 1539.

Collateral References

Guaranty \S 7.
38 C.J.S. Guaranty \S 11.

30-107. (8177) Guaranty of incomplete contract. In a guaranty of a contract, the terms of which are not then settled, it is implied that its terms shall be such as will not expose the guarantor to greater risks than he would incur under those terms which are most common in similar contracts at the place where the principal contract is to be performed.

History: En. Sec. 3620, Civ. C. 1895; re-en. Sec. 5662, Rev. C. 1907; re-en. Sec. 8177, R. C. M. 1921. Cal. Civ. C. Sec. 2799. Field Civ. C. Sec. 1540.

Collateral References

Guaranty \S 36.
38 C.J.S. Guaranty \S 43.

30-108. (8178) Guaranty that an obligation is good or collectible. A guaranty to the effect that an obligation is good, or is collectible, imports that the debtor is solvent, and that the demand is collectible by the usual legal proceedings, if taken with reasonable diligence.

History: En. Sec. 3621, Civ. C. 1895; re-en. Sec. 5663, Rev. C. 1907; re-en. Sec. 8178, R. C. M. 1921. Cal. Civ. C. Sec. 2800. Field Civ. C. Sec. 1541.

30-109. (8179) Recovery upon such guaranty. A guaranty, such as is mentioned in the last section, is not discharged by an omission to take pro-

ceedings upon the principal debt, or upon any collateral security for its payment, if no part of the debt could have been collected thereby.

History: En. Sec. 3622, Civ. C. 1895; re-en. Sec. 5664, Rev. C. 1907; re-en. Sec. 8179, R. C. M. 1921. Cal. Civ. C. Sec. 2801. Field Civ. C. Sec. 1542.

Collateral References
Guaranty \hookrightarrow 70, 71.
38 C.J.S. Guaranty § 61.

30-110. (8180) Guarantor's liability upon such guaranty. In the case mentioned in section 30-108 the removal of the principal from the state, leaving no property therein from which the obligation might be satisfied, is equivalent to the insolvency of the principal in its effect upon the rights and obligations of the guarantor.

History: En. Sec. 3623, Civ. C. 1895; re-en. Sec. 5665, Rev. C. 1907; re-en. Sec. 8180, R. C. M. 1921. Cal. Civ. C. Sec. 2802. Field Civ. C. Sec. 1543.

38 C.J.S. Guaranty §§ 43, 59.
24 Am. Jur. 920, Guaranty, §§ 71 et seq.

Guaranty of payment at maturity as covering expenses of collection. 4 ALR 2d 138.

Collateral References
Guaranty \hookrightarrow 36, 44.

CHAPTER 2

GUARANTORS—LIABILITY AND EXONERATION

- Section 30-201. Guaranty—how construed.
30-202. Liability upon guaranty of payment or performance.
30-203. Liability upon guaranty of a conditional obligation.
30-204. Obligation of guarantor cannot exceed that of the principal.
30-205. Guarantor not liable on an illegal contract.
30-206. Continuing guaranty, what called.
30-207. Revocation.
30-208. What dealings with debtor exonerate guarantor.
30-209. Void promises.
30-210. Rescission of alteration.
30-211. Part performance.
30-212. Delay of creditor does not discharge guarantor.
30-213. Guarantor indemnified by the debtor, not exonerated.
30-214. Discharge of principal by act of law does not discharge guarantor.

30-201. (8181) Guaranty—how construed. A guaranty is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor.

History: En. Sec. 3630, Civ. C. 1895; re-en. Sec. 5666, Rev. C. 1907; re-en. Sec. 8181, R. C. M. 1921. Cal. Civ. C. Sec. 2806. Field Civ. C. Sec. 1544.

Collateral References
Guaranty \hookrightarrow 42.
38 C.J.S. Guaranty §§ 7, 43.
24 Am. Jur. 910, Guaranty, §§ 56, 57.

References

Square Butte State Bank v. Ballard, 64 M 554, 560, 210 P 889; Northwestern F. & M. Ins. Co. v. Pollard, 74 M 142, 150, 238 P 594; General Finance Co. v. Powell, 114 M 473, 480, 138 P 2d 255.

Limitation by guarantor's contract of net credit to be extended to principal debtor as rendering guaranty conditional. 57 ALR 2d 1209.

30-202. (8182) Liability upon guaranty of payment or performance. A guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice.

History: En. Sec. 3631, Civ. C. 1895; re-en. Sec. 5667, Rev. C. 1907; re-en. Sec. 8182, R. C. M. 1921. Cal. Civ. C. Sec. 2807. Field Civ. C. Sec. 1545.

Accelerated Payments Provision

Where a purchase-money mortgage of farm machinery provided that on default of the purchaser in payment of any part of the principal of the notes given by him, the seller was authorized to take possession of the machinery and sell it at public auction without further demand, or at a private sale with or without notice, the liability of the guarantors of the notes became fixed when the buyer failed to make payment at maturity of the notes. *Minneapolis Thresh. Machine Co. v. Jameison*, 70 M 27, 32, 223 P 893.

References

Square Butte State Bank v. Ballard, 64 M 554, 564, 210 P 889; *Mulany v. Mur-*

ray, 68 M 245, 251, 216 P 1105; *Northwestern F. & M. Ins. Co. v. Pollard*, 74 M 142, 238 P 594; *General Finance Co. v. Powell*, 114 M 473, 480, 138 P 2d 255.

Collateral References

Guaranty \hookrightarrow 45, 46.
38 C.J.S. Guaranty §§ 62, 63.
24 Am. Jur. 920, Guaranty, §§ 71 et seq.

Guaranty of payment at maturity as covering expenses of collection. 4 ALR 2d 138.

Who may enforce guaranty. 41 ALR 2d 1213.

Conclusiveness and effect, upon guarantor, of default or consent judgment against principal. 59 ALR 2d 752.

30-203. (8183) Liability upon guaranty of a conditional obligation.

Where one guarantees a conditional obligation, his liability is commensurate with that of the principal, and he is not entitled to notice of the default of the principal, unless he is unable, by the exercise of reasonable diligence, to acquire information of such default, and the creditor has actual notice thereof.

History: En. Sec. 3632, Civ. C. 1895; re-en. Sec. 5668, Rev. C. 1907; re-en. Sec. 8183, R. C. M. 1921. Cal. Civ. C. Sec. 2808. Field Civ. C. Sec. 1546.

30-204. (8184) Obligation of guarantor cannot exceed that of the principal. The obligation of a guarantor must be neither larger in amount nor in other respects more burdensome than that of the principal; and if in its terms it exceeds it, it is reducible in proportion to the principal obligation.

History: En. Sec. 3633, Civ. C. 1895; re-en. Sec. 5669, Rev. C. 1907; re-en. Sec. 8184, R. C. M. 1921. Cal. Civ. C. Sec. 2809. Field Civ. C. Sec. 1547.

Effect of Impossibility of Performance of Contract by Principal

In holding a contract void because the impossibility preventing performance was due to the nature of the thing the contracting company undertook to do, i. e., to obtain a yield of gasoline which could not, by any means be done, held that the

contractor was entitled to a recovery on the quantum meruit; his bond did not permit recovery of damages; a collateral promise in the contract consisting of warranty was invalid and would not support action for breach of warranty; and contractor's lien was supported by the implied contract. *Smith Engineering Co. v. Rice*, 102 F 2d 492.

Collateral References

Guaranty \hookrightarrow 36.
38 C.J.S. Guaranty § 51.

30-205. (8185) Guarantor not liable on an illegal contract. A guarantor is not liable if the contract of the principal is unlawful; but he is liable notwithstanding any mere personal disability of the principal, though the disability be such as to make the contract void against the principal.

History: En. Sec. 3634, Civ. C. 1895; re-en. Sec. 5670, Rev. C. 1907; re-en. Sec. 8185, R. C. M. 1921. Cal. Civ. C. Sec. 2810. Field Civ. C. Sec. 1548.

References

Smith Engineering Co. v. Rice, 102 F 2d 492.

Collateral References

Guaranty \hookrightarrow 5.
38 C.J.S. Guaranty § 16.

30-206. (8186) Continuing guaranty, what called. A guaranty relating to a future liability of the principal, under successive transactions, which

either continue his liability or from time to time renew it after it has been satisfied, is called a continuing guaranty.

History: En. Sec. 3640, Civ. C. 1895; re-en. Sec. 5671, Rev. C. 1907; re-en. Sec. 8186, R. C. M. 1921. Cal. Civ. C. Sec. 2814. Field Civ. C. Sec. 1549.

Collateral References

Guaranty ⇐ 38.
38 C.J.S. Guaranty § 54.

30-207. (8187) Revocation. A continuing guaranty may be revoked at any time by the guarantor, in respect to future transactions, unless there is a continuing consideration as to such transactions which he does not renounce.

History: En. Sec. 3641, Civ. C. 1895; re-en. Sec. 5672, Rev. C. 1907; re-en. Sec. 8187, R. C. M. 1921. Cal. Civ. C. Sec. 2815. Field Civ. C. Sec. 1550.

Collateral References

Guaranty ⇐ 24(1).
38 C.J.S. Guaranty § 36.
24 Am. Jur. 916, Guaranty, §§ 64, 65.

30-208. (8188) What dealings with debtor exonerate guarantor. A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in anywise impaired or suspended.

History: En. Sec. 3650, Civ. C. 1895; re-en. Sec. 5673, Rev. C. 1907; re-en. Sec. 8188, R. C. M. 1921. Cal. Civ. C. Sec. 2819. Field Civ. C. Sec. 1551.

B. & L. Assn. v. Burns, 90 M 402, 416 et seq., 4 P 2d 703.

Amendment of Complaint as Release

A surety is exonerated in like manner as a guarantor (sec. 30-407). Therefore, the surety on an undertaking to secure the release of property from attachment enters into the obligation with reference to the cause as it then stands; and if the plaintiff in the action in which the attachment was levied, without the consent of the surety, subsequently changes his pleading so as to state another and different cause of action, it is such a change as will work a release of the surety. *Gilna v. Fidelity & Deposit Co. et al.*, 83 M 231, 239, 272 P 540.

Actual Injury to Surety Not Necessary

A surety is exonerated in like manner as a guarantor (sec. 30-407). Therefore, if a creditor without the consent of the surety does any act which in contemplation of law alters the surety's liability, increases his risk or deprives him even for a moment of the right to pay the debt and assume the position of the creditor, or of his right to seek indemnity, the surety is discharged and the fact that he may not have been actually injured is immaterial. *United States B. & L. Assn. v. Burns*, 90 M 402, 416 et seq., 4 P 2d 703.

Alteration of Contract Releasing Surety

Where the grantor of mortgaged real property conveys it, the grantee assuming the mortgage (the grantor thus becoming a surety and the grantee the principal debtor), and thereafter the mortgagee enters into a written agreement with the grantee under which he relinquishes his right to receive the gross revenues from the property as provided for under the mortgage contract, requires the grantee to pay only what is left after paying operating expenses and waives default in the payment of taxes as well as his right to foreclose the mortgage because of defaults in paying monthly installments of rent, the original obligation is so materially altered as to release the surety under section 30-407 and this section. *United States*

Compromise of Claim as Release

A guarantor of the payment of a note is relieved from liability when the cashier of the holder, with the knowledge of the holder, accepts as payment from the principal debtor a conveyance of land, cancels the note, and executes a note to the holder for the amount of the debt of the principal debtor. *Stanford v. Coram*, 26 M 285, 304, 67 P 1005.

Under this section, 30-407 and 30-501, where a creditor bank in an action against the receiver of an insolvent debtor bank compromised its claim against the latter thereon, thus discharging its obligation and suspending its rights and remedies against the principal, without the consent of the sureties, they were exonerated. *First Nat. Bank v. Holding et al.*, 90 M 529, 536, 4 P 2d 709.

Extension of Time for Payment as Release

A surety is exonerated in like manner as a guarantor (sec. 30-407). Therefore, where a mortgagee granted a purchaser of the mortgaged property, who had assumed the debt, an extension of one year within which to make payment at a higher rate of interest than that originally provided for, without the consent of his grantor, thus materially altering the terms of the obligation to pay debt, the grantor (surety) was released from liability and therefore the mortgagee was not entitled to a deficiency judgment against him in his action to foreclose. *Shipman v. Terrill et al.*, 84 M 322, 337, 276 P 21.

References

Cited or applied as section 5673, Revised Codes, in *Dodd v. Vucovich*, 38 M 188, 99 P 296; *Vinson v. Pelletier et al.*, 78 M 254, 255 P 1067; *National Surety Co. v. Lincoln County*, 238 Fed 705, 712.

Collateral References

Guaranty 53-57.
38 C.J.S. Guaranty §§ 71-76.

Who may enforce guaranty. 41 ALR 2d 1213.

Extension of net credit in excess of specified amount as discharging or releasing guarantor. 57 ALR 2d 1209.

Guarantor of non-negotiable obligation as released by creditor's acceptance of debtor's note or other paper payable at an extended date. 74 ALR 2d 734.

30-209. (8189) Void promises. A promise by a creditor, which for any cause is void, or voidable by him at his option, does not alter the obligation or suspend or impair the remedy, within the meaning of the last section.

History: En. Sec. 3651, Civ. C. 1895; re-en. Sec. 5674, Rev. C. 1907; re-en. Sec. 8189, R. C. M. 1921. Cal. Civ. C. Sec. 2820. Field Civ. C. Sec. 1552.

References

Cited or applied as section 5674, Revised Codes, in *Dodd v. Vucovich*, 38 M 188, 193, 99 P 296; *United States B. & L. Assn. v. Burns*, 90 M 402, 418, 4 P 2d 703.

30-210. (8190) Rescission of alteration. The rescission of an agreement altering the original obligation of a debtor, or impairing the remedy of a creditor, does not restore the liability of a guarantor who has been exonerated by such agreement.

History: En. Sec. 3652, Civ. C. 1895; re-en. Sec. 5675, Rev. C. 1907; re-en. Sec. 8190, R. C. M. 1921. Cal. Civ. C. Sec. 2821. Field Civ. C. Sec. 1553.

30-211. (8191) Part performance. The acceptance, by a creditor, of anything in partial satisfaction of an obligation, reduces the obligation of a guarantor thereof, in the same measure as that of the principal, but does not otherwise affect it.

History: En. Sec. 3653, Civ. C. 1895; re-en. Sec. 5676, Rev. C. 1907; re-en. Sec. 8191, R. C. M. 1921. Cal. Civ. C. Sec. 2822. Field Civ. C. Sec. 1554.

385, 391, 236 P 545; *Vinson v. Pelletier et al.*, 78 M 254, 271, 255 P 1067.

Collateral References

Guaranty 59, 60.
38 C.J.S. Guaranty §§ 77, 78.

References

Mutual Oil Co. v. Hamilton et al., 73 M

30-212. (8192) Delay of creditor does not discharge guarantor. Mere delay on the part of a creditor to proceed against the principal, or to enforce any other remedy, does not exonerate a guarantor.

History: En. Sec. 3654, Civ. C. 1895; re-en. Sec. 5677, Rev. C. 1907; re-en. Sec. 8192, R. C. M. 1921. Cal. Civ. C. Sec. 2823. Field Civ. C. Sec. 1555.

References

Northwestern F. & M. Ins. Co. v. Polard, 74 M 142, 150, 238 P 594.

Collateral ReferencesGuaranty \Rightarrow 70.

38 C.J.S. Guaranty § 61.

Who may enforce guaranty. 41 ALR 2d 1213.

Bar of statute of limitations as against primary debtor as release or discharge of, or defense available to, guarantor. 58 ALR 2d 1272.

30-213. (8193) Guarantor indemnified by the debtor, not exonerated. A guarantor, who has been indemnified by the principal, is liable to the creditor to the extent of the indemnity, notwithstanding that the creditor, without the assent of the guarantor, may have modified the contract or released the principal.

History: En. Sec. 3655, Civ. C. 1895; re-en. Sec. 5678, Rev. C. 1907; re-en. Sec. 8193, R. C. M. 1921. Cal. Civ. C. Sec. 2824. Field Civ. C. Sec. 1556.

Collateral ReferencesGuaranty \Rightarrow 48.

38 C.J.S. Guaranty § 67.

30-214. (8194) Discharge of principal by act of law does not discharge guarantor. A guarantor is not exonerated by the discharge of his principal by operation of law, without the intervention or omission of the creditor.

History: En. Sec. 3656, Civ. C. 1895; re-en. Sec. 5679, Rev. C. 1907; re-en. Sec. 8194, R. C. M. 1921. Cal. Civ. C. Sec. 2825. Field Civ. C. Sec. 1557.

Collateral ReferencesGuaranty \Rightarrow 50, 64.

38 C.J.S. Guaranty §§ 69-71, 83.

CHAPTER 3

INDEMNITY

Section 30-301. Indemnity defined.

30-302. Indemnity for a future wrongful act void.

30-303. Indemnity for a past wrongful act valid.

30-304. Indemnity extends to acts of agents.

30-305. Indemnity to several.

30-306. Persons indemnifying liable jointly or severally with person indemnified.

30-307. Rules for interpreting agreement of indemnity.

30-308. When person indemnifying is a surety.

30-301. (8163) Indemnity defined. Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person.

History: En. Sec. 3580, Civ. C. 1895; re-en. Sec. 5648, Rev. C. 1907; re-en. Sec. 8163, R. C. M. 1921. Cal. Civ. C. Sec. 2772. Field Civ. C. Sec. 1524.

price, the note should be void, the agreement, evidenced by the note and endorsement, was one of indemnity within the meaning of this section, and not of guaranty. *Peterson v. Nelson*, 77 M 539, 549, 252 P 368.

Dividend Guaranty Note

Where, for the purpose of inducing the purchase of corporate stock, the seller gave the buyer a promissory note payable in three years, the back of which bore the endorsement that when the stock had paid dividends to the amount of the purchase

Collateral ReferencesIndemnity \Rightarrow 1.

42 C.J.S. Indemnity § 1.

27 Am. Jur. 455, Indemnity, generally.

30-302. (8164) Indemnity for a future wrongful act void. An agreement to indemnify a person against an act thereafter to be done is void, if the act be known by such person, at the time of doing it, to be unlawful.

History: En. Sec. 3581, Civ. C. 1895; re-en. Sec. 5649, Rev. C. 1907; re-en. Sec.

8164, R. C. M. 1921. Cal. Civ. C. Sec. 2773. Field Civ. C. Sec. 1525.

Effect of Trespass

An implied promise to indemnify a sheriff for making an attachment was not void under this section where the rights of the rival claimants to the attached personality were not clear; the fact that the steps taken by the officer, originally supposed proper, subsequently proved a trespass did not render the promise void. *Weir v. Hum Tong*, 100 M 1, 6, 46 P 2d 45.

Implied Indemnity Agreement Sustained

A sheriff attached furniture on instructions of attaching creditor. Later in conversion suit some of the furniture was

held exempt and claimant awarded damages against sheriff for its retention. In sheriff's action to recover from attaching creditor on implied promise of indemnity the claim of the attaching creditor that officer knew his act was unlawful and the indemnity agreement was therefore void under this section was without merit. *Weir v. Hum Tong*, 100 M 1, 6, 46 P 2d 45.

Collateral References

Indemnity \Rightarrow 3.

42 C.J.S. Indemnity § 7.

30-303. (8165) Indemnity for a past wrongful act valid. An agreement to indemnify a person against an act already done is valid, even though the act was known to be wrongful, unless it was a felony.

History: En. Sec. 3582, Civ. C. 1895; 8165, R. C. M. 1921. Cal. Civ. C. Sec. 2774. re-en. Sec. 5650, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1526.

30-304. (8166) Indemnity extends to acts of agents. An agreement to indemnify against the acts of a certain person applies not only to his acts and their consequences, but also to those of his agents.

History: En. Sec. 3583, Civ. C. 1895; re-en. Sec. 5651, Rev. C. 1907; re-en. Sec. 8166, R. C. M. 1921. Cal. Civ. C. Sec. 2775. Field Civ. C. Sec. 1527.

Collateral References

Indemnity \Rightarrow 9(1).

42 C.J.S. Indemnity § 13.

30-305. (8167) Indemnity to several. An agreement to indemnify several persons applies to each, unless a contrary intention appears.

History: En. Sec. 3584, Civ. C. 1895; 8167, R. C. M. 1921. Cal. Civ. C. Sec. 2776. re-en. Sec. 5652, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1528.

30-306. (8168) Persons indemnifying liable jointly or severally with person indemnified. One who indemnifies another against an act to be done by the latter is liable jointly with the person indemnified, and separately to every person injured by such act.

History: En. Sec. 3585, Civ. C. 1895; re-en. Sec. 5653, Rev. C. 1907; re-en. Sec. 8168, R. C. M. 1921. Cal. Civ. C. Sec. 2777. Field Civ. C. Sec. 1529.

joined as defendant with the insured. *Conley v. United States Fidelity Co.*, 98 M 31, 37, 37 P 2d 565.

"An Act to be Done"

The phrase "an act to be done," as used in this section, with reference to which the indemnity exists, clearly implied an act the nature of which is known to the parties, and one which is yet anticipated. It also strongly implies that the liability contemplated is to accrue from the doing of the act, and not upon the contract of indemnity. *Cummings v. Reins Copper Co.*, 40 M 599, 620, 107 P 904; *Conley v. United States Fidelity Co.*, 98 M 31, 37 P 2d 565.

Declaratory of the Common Law

This section is simply declaratory of the common law, and has no application to a case in which one company has con-

Action against Insurance Company Not Maintainable until Liability of Insured Adjudicated

Where an insurance company agrees under a public liability policy to indemnify the owner of an automobile for damages arising from its operation, specifically providing, however, that no action against it (the insurer) for injuries sustained shall be brought unless final judgment remains unsatisfied, this section, declaring that the insurer is jointly liable with the indemnitee, does not operate prior to an adjudication of liability against the insured; hence an action by the injured person prior to such adjudication does not lie against the insurer alone nor against it

tracted to indemnify another employing company for damages to its employees; one of the companies, if answerable at all, is liable for contract; the other for a tort. *Cummings v. Reins Copper Co.*, 40 M 599, 620, 107 P 904.

General Import of Section

The import of this section is, that the indemnitor gives a bond, in consideration of which the indemnitee agrees or is induced to act, or to refrain from acting, to the injury of a third person. *Northam v. Casualty Co. of America*, 177 Fed 981, 984.

"To Be Done By"

The phrase "to be done by," as used

in this section, implies on the part of the indemnitee an agreement or obligation to commit the tort in question, as if the phrase were "an act required (or demanded or requested) to be done by" the indemnitee, and, as so construed, the section is merely declaratory of the common law. *Northam v. Casualty Co. of America*, 177 Fed 981, 984.

Collateral References

Indemnity  7.

42 C.J.S. Indemnity § 10.

Owner's right to indemnity from manufacturer or dealer for injury consequent upon spraying or dusting of crop. 12 ALR 2d 436, Supp Serv § 7.5.

30-307. (8169) Rules for interpreting agreement of indemnity. In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears:

1. Upon an indemnity against liability, expressly, or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable.

2. Upon an indemnity against claims, or demands, or damages, or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof.

3. An indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, embraces the costs of defense against such claims, demands, or liability incurred in good faith, and in the exercise of a reasonable discretion.

4. The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct such defenses, if he chooses to do so.

5. If, after request, the person indemnifying neglects to defend the person indemnified, a recovery against the latter, suffered by him in good faith, is conclusive in his favor against the former.

6. If the person indemnifying, whether he is a principal or a surety in the agreement, has not reasonable notice of the action or proceeding against the person indemnified, or is not allowed to control its defense, judgment against the latter is only presumptive evidence against the former.

7. A stipulation, that a judgment against the person indemnified shall be conclusive upon the person indemnifying, is inapplicable if he had a good defense upon the merits, which by want of ordinary care he failed to establish in the action.

History: En. Sec. 3586, Civ. C. 1895; re-en. Sec. 5654, Rev. C. 1907; re-en. Sec. 8169, R. C. M. 1921. Cal. Civ. C. Sec. 2778. Field Civ. C. Sec. 1530.

Burden of Proof

The burden is on the indemnifying person in a suit on the contract of indemnity

to rebut the presumption raised by this section. *City of Butte v. Cook*, 29 M 88, 92, 74 P 67.

In an action on an indemnity policy, the burden is upon the insurer to rebut the presumption provided for by this section, that if after request the insurer neglects to defend the person indemnified, a re-

covery against the latter suffered by him in good faith is conclusive in his favor against the insurer. *Independent M. & C. Co. v. Aetna L. I. Co.*, 68 M 111, 157, 216 P 1109.

Cosurety's Signature as Condition

Where the names of two sureties appear in the body of an indemnifying bond, which is, however, signed by but one, the condition of the bond is notice to the obligee, so as to permit the defense, by the surety signing, that his liability was conditioned on obtaining the signature of his cosurety. *City of Butte v. Cook*, 29 M 88, 95, 74 P 67.

References

Union Electric Co. v. Lovell Livestock Co., 93 M 577, 583, 20 P 2d 255.

Collateral References

Indemnity \hookrightarrow 6-11.

42 C.J.S. Indemnity § 8.

27 Am. Jur. 462, Indemnity, §§ 13-15.

Construction and effect of indemnity clause in spur track agreement. 20 ALR 2d 711.

Sufficiency and timeliness of notice by indemnitee to indemnitor of action by third person. 73 ALR 2d 504.

30-308. (8170) When person indemnifying is a surety. Where one, at the request of another, engages to answer in damages, whether liquidated or unliquidated, for any violation of duty on the part of the latter, he is entitled to be reimbursed in the same manner as a surety, for whatever he may pay.

History: En. Sec. 3587, Civ. C. 1895; re-en. Sec. 5655, Rev. C. 1907; re-en. Sec. 8170, R. C. M. 1921. Cal. Civ. C. Sec. 2779. Field Civ. C. Sec. 1531.

Collateral References

Indemnity \hookrightarrow 16.

42 C.J.S. Indemnity § 38.

CHAPTER 4

SURETYSHIP—SURETIES AND THEIR LIABILITY

Section 30-401. Surety defined.

30-402. Apparent principal may show that he is surety.

30-403. Limit of surety's obligation.

30-404. Rules of interpretation.

30-405. Judgment against surety does not alter the relation.

30-406. Surety exonerated by performance or offer of performance.

30-407. Surety discharged by certain acts of the creditor.

30-401. (8195) Surety defined. A surety is one who, at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor.

History: En. Sec. 3670, Civ. C. 1895; re-en. Sec. 5680, Rev. C. 1907; re-en. Sec. 8195, R. C. M. 1921. Cal. Civ. C. Sec. 2831. Field Civ. C. Sec. 1558.

Distinction Between Surety and Guarantor

The codes preserve the general distinction between suretyship and guaranty, which is that a surety is bound with the principal as an original promisor on the same contract, while the guarantor makes his own separate contract. This distinction is to be observed in this section. *Cole Mfg. Co. v. Morton*, 24 M 58, 61, 60 P 587.

Pledging Property as Surety for Obligation of Another—Pledgor a Surety

The owner of property who pledges it

as security for the obligation of another person becomes a surety, and as such is discharged from liability where the creditor, without the pledgor's consent, alters the terms of the original obligation or in anywise impairs or suspends any remedies he may have against the principal. *Vinson v. Pelletier et al.*, 78 M 254, 271, 255 P 1067.

Surety in General

Where part of an agreement creating an agency was a bond executed to plaintiff by the agent and the defendants, conditioned that if the agent failed to perform his duties, and pay over to the plaintiff such sums as might be due him, the defendants would pay such sum, not exceeding two hundred dollars, the defend-

ants were sureties within the meaning of this section. *Cole Mfg. Co. v. Morton*, 24 M 58, 61, 60 P 587.

When Negotiable Instruments Act Supersedes the Law of Suretyship

The Uniform Negotiable Instruments Act (secs. 55-101 to 55-1706) supersedes the law of suretyship (secs. 30-401 to 30-507) as theretofore applicable to negotiable instruments, and therefore one who signed a note as maker bound himself absolutely to pay, though in fact but an accommodation maker, and could not escape liability to a holder in due course under a plea of having been a surety only. *Merchants' Nat. Bank v. Smith et al.*, 59 M 280, 288, 196 P 523.

30-402. (8196) Apparent principal may show that he is surety. One who appears to be a principal, whether by the terms of a written instrument or otherwise, may show that he is in fact a surety, except as against persons who have acted on the faith of his apparent character of principal.

History: En. Sec. 3671, Civ. C. 1895; re-en. Sec. 5681, Rev. C. 1907; re-en. Sec. 8196, R. C. M. 1921. Cal. Civ. C. Sec. 2832. Field Civ. C. Sec. 1559.

Vehicle Purchase Contract

In an action between the original parties to a contract, it is competent to show

References

Cited or applied as section 5680, Revised Codes, in *Columbus State Bank v. Erb*, 50 M 422, 449, 147 P 617; *State ex rel. Barnett v. Reynolds et al.*, 68 M 572, 576, 220 P 525; *Butte Mach. Co. v. Carbonate Hill Mill. Co.*, 75 M 167, 170, 242 P 956; *Gary Hay & Grain Co., Inc. v. Carlson*, 79 M 111, 123, 255 P 722.

Collateral References

Principal and Surety \hookrightarrow 1.
72 C.J.S. Principal and Surety § 2.
50 Am. Jur. 903, Suretyship, § 2.

that the purchaser of an automobile was the principal and each of the other defendants a surety only. *Stanhope v. Sham-bow*, 54 M 360, 364, 170 P 753.

Collateral References

Principal and Surety \hookrightarrow 45.
72 C.J.S. Principal and Surety § 12.

30-403. (8197) Limit of surety's obligation. A surety cannot be held beyond the express terms of his contract, and if such contract prescribes a penalty for its breach, he cannot in any case be liable for more than the penalty.

History: En. Sec. 3680, Civ. C. 1895; re-en. Sec. 5682, Rev. C. 1907; re-en. Sec. 8197, R. C. M. 1921. Cal. Civ. C. Sec. 2836. Field Civ. C. Sec. 1560.

Official Bond

Where the law defines the duties of a public officer, his sureties are responsible for the faithful performance of such duties only, and not for acts not pertaining thereto; and under this rule an action did not lie against the sureties on a county assessor's bond to recover moneys improperly paid to him as compensation for the collection by him of certain city taxes, which is a duty imposed by law upon other officers. *City of Butte v. Bennetts*, 51 M 27, 30, 149 P 92.

Stay of Execution Bond

Stay of execution being a consideration

of great value, sureties who execute an undertaking therefor have a right to rely upon the letter of their bond, and to stand upon the entirety of the expressed consideration therein, and their liability cannot be extended by implication. This principle is formulated in this section and the next succeeding section. *State ex rel. Reins v. District Court*, 22 M 449, 453, 57 P 89, 145.

References

Merchants' Nat. Bank v. Smith et al., 59 M 280, 288, 196 P 523; *Gilna v. Fidelity & Deposit Co. et al.*, 83 M 231, 239, 272 P 540.

Collateral References

Principal and Surety \hookrightarrow 66.
72 C.J.S. Principal and Surety § 90.
50 Am. Jur. 921, Suretyship, §§ 29 et seq.

30-404. (8198) Rules of interpretation. In interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts.

History: En. Sec. 3681, Civ. C. 1895; re-en. Sec. 5683, Rev. C. 1907; re-en. Sec. 8198, R. C. M. 1921. Cal. Civ. C. Sec. 2837. Field Civ. C. Sec. 1561.

Clear Breach of Bond

Though sureties are, in a sense, favorites in the law, such rule does not prevent a recovery when the facts are sufficient to show that the provisions of a bond given by them have been breached. *Roper v. Caterpillar Tractor Co. et al.*, 98 M 76, 89, 37 P 2d 812.

References

Cited or applied as section 3681, Civil Code, in *State ex rel. Reins v. District Court*, 22 M 449, 453, 57 P 89, 145; *Whittaker v. United States Fidelity & Guaranty Co.*, 300 Fed 129.

Collateral References

Principal and Surety ⇨ 59.
72 C.J.S. Principal and Surety § 100.

30-405. (8199) Judgment against surety does not alter the relation.

Notwithstanding the recovery of judgment by a creditor against a surety, the latter still occupies the relation of surety.

History: En. Sec. 3682, Civ. C. 1895; re-en. Sec. 5684, Rev. C. 1907; re-en. Sec. 8199, R. C. M. 1921. Cal. Civ. C. Sec. 2838. Field Civ. C. Sec. 1562.

Collateral References

Principal and Surety ⇨ 163.
72 C.J.S. Principal and Surety § 277.

30-406. (8200) Surety exonerated by performance or offer of performance. Performance of the principal obligation, or an offer of such performance, duly made as provided in this code, exonerates a surety.

History: En. Sec. 3683, Civ. C. 1895; re-en. Sec. 5685, Rev. C. 1907; re-en. Sec. 8200, R. C. M. 1921. Cal. Civ. C. Sec. 2839. Based on Field Civ. C. Sec. 1563.

Collateral References

Principal and Surety ⇨ 90.
72 C.J.S. Principal and Surety § 232.
50 Am. Jur. 932, Suretyship, §§ 40 et seq.

30-407. (8201) Surety discharged by certain acts of the creditor. A surety is exonerated:

1. In like manner with a guarantor;
2. To the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights, or which lessens his security; or,
3. To the extent to which he is prejudiced by an omission of the creditor to do anything, when required by the surety, which it is his duty to do.

History: En. Sec. 3684, Civ. C. 1895; re-en. Sec. 5686, Rev. C. 1907; re-en. Sec. 8201, R. C. M. 1921. Cal. Civ. C. Sec. 2840. Field Civ. C. Sec. 1564.

due to the nature of the thing the contracting company undertook to do, i. e., to obtain a yield of gasoline which could not, by any means be done, held that the contractor was entitled to a recovery on the quantum meruit; his bond did not permit recovery of damages; a collateral promise in the contract consisting of warranty was invalid and would not support action for breach of warranty; and contractor's lien was supported by the implied contract. *Smith Engineering Co. v. Rice*, 102 F 2d 492.

Cross-Reference

Exoneration of guarantor, sec. 30-208.

Crystallization of the Common Law

Section 30-501, providing that a surety has all the rights of a guarantor, and this section and section 30-208, declaring when a surety and a guarantor are exonerated, are but crystallizations of common-law principles, and therefore common-law rules must be followed in their interpretation, unless otherwise provided by statute. *United States B. & L. Assn. v. Burns*, 90 M 402, 416 et seq., 4 P 2d 703.

Effect of Impossibility of Performance of Contract by Principal

In holding a contract void because the impossibility preventing performance was

Estoppel of Sureties by Implied Assent

Where endorsers on a note knew of, and impliedly gave their assent to, sales of livestock mortgaged to secure it, they were estopped, on the theory that their liability was that of sureties only, to insist that the mortgagee, by permitting the mortgagor to make the sales, had impaired the mortgage security, and that they had been injured by the mortgagor's misman-

agement and misappropriation of the proceeds. *Columbus State Bank v. Erb*, 50 M 442, 453, 147 P 617.

Negotiable Instruments

The Uniform Negotiable Instruments Act (secs. 55-101 to 55-1706) supersedes the law of suretyship (secs. 30-401 to 30-507) as theretofore applicable to negotiable instruments; therefore, one who signed a note as maker bound himself absolutely to pay, though in fact but an accommodation maker, and could not escape liability to a holder in due course under a plea of having been a surety only. *Merchants' Nat. Bank v. Smith et al.*, 59 M 280, 288, 196 P 523.

Prejudice of Surety Required for Release

Where a lease of real property provided that rent should be paid quarterly in advance, a bond being given to secure the payment of the rent, and the lessor voluntarily, and without consideration therefor, reduced the rent for one quarter, and at different times permitted the lessee to make payments at irregular intervals, and not as provided in the lease, the sureties on the bond were not released from liability under any of the subdivisions of this section, in the absence of any showing that they were injured or prejudiced by the action of the lessor. *Dodd v. Vucovich*, 38 M 188, 193, 99 P 296. See *National Surety Co. v. Lincoln County*, 238 Fed 705, 711.

In an action on the official bond of a sheriff to recover damages for the wrongful conversion of attached property by the officer, in which defendant surety alleged that its rights had been prejudiced by the release of sureties on an indemnity bond given the sheriff on refusal to release the attached property, since the released sureties were not liable under their bond for the tort committed by the sheriff, defendant surety company was not prejudiced by their release within the meaning of this section, and therefore their release did not result in its exoneration to the extent of the alleged prejudice. *McGinley v. Maryland Casualty Co.*, 85 M 1, 6, 277 P 414.

The second and third subdivisions of this section are controlling, notwithstanding the provisions of section 30-208, so that a surety is not released by premature payments to his principal, whereby the surety could not be injured. *National*

Surety Co. v. Lincoln County, 238 Fed 705, 712.

Release of Sureties in General

The surety on an undertaking to secure the release of property from attachment enters into the obligation with reference to the cause as it then stands; and if the plaintiff in the action in which the attachment was levied, without the consent of the surety, subsequently changes his pleading so as to state another and different cause of action, it is such a change as will work a release of the surety. *Gilna v. Fidelity & Deposit Co. et al.*, 83 M 231, 272 P 540.

Under section 30-208, this section and section 30-501, where a creditor bank in an action against the receiver of an insolvent debtor bank compromised its claim against the latter thereon, thus discharging its obligation and suspending its rights and remedies against the principal, without the consent of the sureties, they were exonerated. *First Nat. Bank v. Holding et al.*, 90 M 529, 536, 4 P 2d 709.

Release of Surety Special Defense and Must be Pleaded

Release of a surety is a special defense which must be pleaded; hence where it was not pleaded, refusal to permit defendant sureties to ask a witness for plaintiff whether plaintiff had not accepted a receiver's certificate in partial satisfaction of the obligation sued on, in an effort to establish that defense, was proper; the ruling was further correct because of failure of an offer of proof that the certificate had been accepted in partial satisfaction of plaintiff's claim or that the sureties had been prejudiced by its acceptance. *Mutual Oil Co. v. Hamilton et al.*, 73 M 385, 391, 236 P 545.

References

Vinson v. Pelletier et al., 78 M 254, 255 P 1067.

Collateral References

Principal and Surety § 90.
72 C.J.S. Principal and Surety § 232.

Discharge of surety by release of mortgage or other security given for note. 2 ALR 2d 260.

Release of one of joint and several delinquent tortfeasors as releasing insurer which was surety on fidelity bond of each. 35 ALR 2d 1122.

CHAPTER 5

RIGHTS OF SURETIES AND CREDITORS

Section 30-501. Surety has rights of guarantor.

30-502. Surety may require the creditor to proceed against the principal.

- 30-503. Surety may compel principal to perform obligations when due.
 30-504. A principal bound to reimburse his surety.
 30-505. Surety's right of subrogation—contribution from cosureties.
 30-506. Surety entitled to benefit of securities held by creditor.
 30-507. The property of principal to be taken first.
 30-508. Creditor entitled to benefit of securities held by surety.

30-501. (8202) Surety has rights of guarantor. A surety has all the right of a guarantor, whether he becomes personally responsible or not.

History: En. Sec. 3690, Civ. C. 1895; re-en. Sec. 5687, Rev. C. 1907; re-en. Sec. 8202, R. C. M. 1921. Cal. Civ. C. Sec. 2844. Field Civ. C. Sec. 1565.

Crystallization of Common Law

This section, providing that a surety has all the rights of a guarantor, and sections 30-208 and 30-407, declaring when a surety and a guarantor are exonerated, are but crystallizations of common-law principles, and therefore common-law rules must be followed in their interpretation, unless otherwise provided by statute. *United States B. & L. Assn. v. Burns*, 90 M 402, 416, 4 P 2d 703.

30-502. (8203) Surety may require the creditor to proceed against the principal. A surety may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety cannot himself pursue, and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced.

History: En. Sec. 3691, Civ. C. 1895; re-en. Sec. 5688, Rev. C. 1907; re-en. Sec. 8203, R. C. M. 1921. Cal. Civ. C. Sec. 2845. Field Civ. C. Sec. 1566.

Surety's Rights as Against Assignee

Under this section and 30-506, the surety on a bond of a road contractor given the state highway commission pursuant to section 32-1608, acquired an equity in the earnings of the contractor remaining in the hands of the commission, superior to that of a bank to which the contractor had made an assignment of moneys due him under the contract as security for loans extended, and was entitled to have the funds retained by the commission applied in satisfaction of labor and material claims, payment of which was secured by the bond, before any portion of it was paid to the assignee. *Lanstrum et al. v. Zumwalt et al.*, 73 M 502, 513, 237 P 205.

References

Mutual Oil Co. v. Hamilton et al., 73 M 385, 391, 236 P 545; *Shipman v. Terrill et al.*, 84 M 322, 338, 276 P 21; *First Nat. Bank v. Holding et al.*, 90 M 529, 536, 4 P 2d 709; *Brown v. Federal Surety Co.*, 91 M 389, 400, 8 P 2d 647; *Smith Engineering Co. v. Rice*, 102 F 2d 492, 499.

Collateral References

Principal and Surety ¶167.
 72 C.J.S. *Principal and Surety* § 286.

Withholding Distribution of Estate

Under this section, an administratrix with the will annexed must withhold from the distributive share of a former executor (who was also a beneficiary under the will) any moneys for which such former executor became indebted to the estate during his administration thereof, when required by the surety of such former executor to do so, otherwise the surety will be exonerated to the extent that the distributive share will cover the indebtedness, since the surety as well as the estate of the former executor is liable for the indebtedness. *Maryland Casualty Co. v. Walsh*, 116 M 559, 562, 155 P 2d 759.

Collateral References

Principal and Surety ¶168.
 72 C.J.S. *Principal and Surety* § 287.
 50 Am. Jur. 1071, *Suretyship*, §§ 255, 256.

30-503. (8204) Surety may compel principal to perform obligations when due. A surety may compel his principal to perform the obligations when due.

History: En. Sec. 3692, Civ. C. 1895; re-en. Sec. 5689, Rev. C. 1907; re-en. Sec. 8204, R. C. M. 1921. Cal. Civ. C. Sec. 2846. Field Civ. C. Sec. 1567.

References

Maryland Casualty Co. v. Walsh, 116 M 559, 564, 155 P 2d 759.

Collateral References

Principal and Surety—173.
72 C.J.S. Principal and Surety § 300.

Applicability to compensated surety or bonding company of statute discharging

surety where creditor fails to bring suit against principal after notice. 42 ALR 2d 1159.

Conclusiveness and effect, upon surety, of default or consent judgment against principal. 59 ALR 2d 752.

30-504. (8205) A principal bound to reimburse his surety. If a surety satisfies the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what he has disbursed, including necessary costs and expenses; but the surety has no claim for reimbursement against other persons, though they may have been benefited by his act, except as prescribed by the next section.

History: En. Sec. 3693, Civ. C. 1895; re-en. Sec. 5690, Rev. C. 1907; re-en. Sec. 8205, R. C. M. 1921. Cal. Civ. C. Sec. 2847. Field Civ. C. Sec. 1568.

Accommodation Paper

The relations between parties to accommodation paper are those of principal and surety, and therefore the right of the accommodation party to recourse against the party accommodated is that of a surety against the principal debtor, i. e., the principal is bound to reimburse the surety for what he had disbursed, including necessary costs and expenses and an agreement to repay is unnecessary to constitute a cause of action to recover the amount paid by the accommodation maker in a suit by his special administrator. *Bielenberg v. Higgins et al.*, 85 M 69, 71, 277 P 636.

Agreement of Principal to Reimburse Surety—When Material

Since the principal is bound under this section to reimburse the surety for what he has disbursed, an agreement of principal to do so when applying for the bond becomes material only if it entitles the surety to indemnity without any part of the principal obligation having been satisfied. *Maryland Casualty Co. v. Walsh*, 116 M 559, 561, 155 P 2d 759.

Equitable Assignments—Procedure to Determine Heirship

Where bonding company claimed an equitable assignment of principal's distributive share of estate on theory that an agreement in application for bond to indemnify surety for expense of suit incurred under the bond constituted such assignment, and proceeded under sections 91-3801 to 91-3803 to determine heirship and interests in estate, neither statutory nor contractual liability constitutes equitable assignment of principal's property; nor does plaintiff's claim have priority over all other claims. *Maryland Casualty Co. v. Walsh*, 116 M 559, 562, 155 P 2d 759.

Judgment against Surety Not Required

While it is the law that unless a surety is legally bound to make payment on behalf of his principal he is not entitled to reimbursement, and if he makes payment he is a volunteer-payer, it is not the law that he is legally bound only after judicial determination, the foregoing section providing otherwise; if he can prove that he was legally bound to pay, he can recover in an action for reimbursement, under attachment. *Kipp v. Paul*, 110 M 513, 515, 103 P 2d 675.

Collateral References

Principal and Surety—185.
72 C.J.S. Principal and Surety § 307.
50 Am. Jur. 1049, Suretyship, § 221.

30-505. (8206) Surety's right of subrogation—contribution from co-sureties. A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended, and also to require all his co-sureties to contribute thereto, without regard to the order of time in which they became such.

History: En. Sec. 3694, Civ. C. 1895; re-en. Sec. 5691, Rev. C. 1907; re-en. Sec. 8206, R. C. M. 1921. Cal. Civ. C. Sec. 2848. Field Civ. C. Sec. 1569.

Cross-Reference

Subrogation of surety on appeal bond, sec. 93-8715.

Depository Bond Surety

Where deposits of state funds are secured by a bond, and the surety is compelled to pay the amount thereof upon failure of the bank, the right of the state, if existent and not lost in some way, passes by subrogation to the surety. *Aetna Accident & Liability Co. v. Miller*, 54 M 377, 382, 170 P 760.

Implied Contract of Cosureties to Contribute

An action by a surety for contribution from his cosurety is one on an implied contract for money paid by the former for the use and benefit of the latter, which the latter unconditionally and absolutely is required to pay, under this section, in a definite sum, to wit, his proportion of the amount which plaintiff was required to pay on the undertaking; hence the action is one for the direct payment of money in which attachment may issue. *Wall v. Brookman*, 72 M 228, 232, 232 P 774.

Where one of several sureties is compelled to pay the principal debtor's obligation, the law implies a contract on the

part of his cosureties to contribute their share, and such implied contract is one for the direct payment of money, warranting the issuance of a writ of attachment in an action for contribution against the cosureties, even though he may not have been judicially compelled to make payment. *Kipp v. Paul*, 110 M 518, 519, 103 P 2d 675.

Proper Case for Attachment Proceedings

Where a surety is compelled to pay the principal's obligation, the law implies a contract on the part of the principal to reimburse his surety, and such a contract is one for the direct payment of money presenting a proper case for attachment proceedings. *Kipp v. Paul*, 110 M 513, 515, 103 P 2d 675.

Collateral References

Principal and Surety 194; Subrogation 7.

72 C.J.S. Principal and Surety § 352; 83 C.J.S. Subrogation § 47.

50 Am. Jur. 1082, Suretyship, §§ 270 et seq.

30-506. (8207) Surety entitled to benefit of securities held by creditor.

A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, or by a cosurety at the time of entering into the contract of suretyship, or acquired by him afterwards, whether the surety was aware of the security or not.

History: En. Sec. 3695, Civ. C. 1895; re-en. Sec. 5692, Rev. C. 1907; re-en. Sec. 8207, R. C. M. 1921. Cal. Civ. C. Sec. 2849. Field Civ. C. Sec. 1570.

Assignment as Chattel Mortgage

Where a road construction contractor in his application for a surety company bond to secure the performance of his contract assigns his tools, equipment, etc., to the surety, the assignment to become of full force and effect upon his failure or inability to complete the work, the application constitutes a chattel mortgage upon the property as between him and the surety. *Brown v. Federal Surety Co.*, 91 M 389, 400, 8 P 2d 647.

Surety's Rights as Against Assignee

Under section 30-502, and this section, the surety on a bond of a road contractor given the state highway commission pursuant to section 32-1608, acquired an equity in the earnings of the contractor remaining in the hands of the commission, superior to that of a bank to which the contractor had made an assignment of moneys due him under the contract as

security for loans extended, and was entitled to have the funds retained by the commission applied in satisfaction of labor and material claims, payment of which was secured by the bond, before any portion of it was paid to the assignee. *Lanstrum et al. v. Zumwalt et al.*, 73 M 502, 513, 237 P 205.

References

Cited or applied as section 5692, Revised Codes, in *Aetna Accident & Liability Co. v. Miller*, 54 M 377, 382, 170 P 760; *Merchants' Nat. Bank v. Smith et al.*, 59 M 280, 288, 196 P 523; *McGinley v. Maryland Casualty Co.*, 85 M 1, 6, 277 P 414.

Collateral References

Subrogation 7, 9.
83 C.J.S. Subrogation §§ 47, 58.
50 Am. Jur. 1072, Suretyship, §§ 257, 258.

Subrogation rights of surety on public work contractor's bond in percentage retained by obligee, as against unpaid laborers or materialmen. 61 ALR 2d 899.

30-507. (8208) The property of principal to be taken first. Whenever property of a surety is hypothecated with property of the principal, the

surety is entitled to have the property of the principal first applied to the discharge of the obligation.

History: En. Sec. 3696, Civ. C. 1895; 8208, R. C. M. 1921. Cal. Civ. C. Sec. 2850. re-en. Sec. 5693, Rev. C. 1907; re-en. Sec. Field Civ. C. Sec. 1571.

30-508. (8209) Creditor entitled to benefit of securities held by surety. A creditor is entitled to the benefit of everything which a surety has received from the debtor by way of security for the performance of the obligation, and may, upon the maturity of the obligation, compel the application of such security to its satisfaction.

History: En. Sec. 3700, Civ. C. 1895; re-en. Sec. 5694, Rev. C. 1907; re-en. Sec. 8209, R. C. M. 1921. Cal. Civ. C. Sec. 2854. Field Civ. C. Sec. 1572.

Security Provided by Stranger

In an action to recover on an appeal bond, where it appeared that a stranger to the original action had deposited in bank a sum of money to indemnify the sureties on the bond, the principle of subrogation embodied in this section, may not be in-

voked by the creditor. *O'Neill v. State Savings Bank*, 34 M 521, 526, 87 P 970.

References

Kinyon Inc. Co. v. Belmont State Bank, 69 M 282, 287, 221 P 286.

Collateral References

Principal and Surety ⇨ 147(1).
72 C.J.S. *Principal and Surety* § 282.
50 Am. Jur. 1020, *Suretyship*, §§ 177 et seq.

CHAPTER 6

LETTERS OF CREDIT

- Section 30-601. Letter of credit defined.
30-602. How addressed.
30-603. Liability of the writer.
30-604. Letters of credit either general or special.
30-605. Nature of general letter of credit.
30-606. Extent of general letter of credit.
30-607. A letter of credit may be a continuing guaranty.
30-608. When notice of the writer necessary.
30-609. The credit given must agree with the terms of the letter.

30-601. (8210) Letter of credit defined. A letter of credit is a written instrument, addressed by one person to another, requesting the latter to give credit to the person in whose favor it is drawn.

History: En. Sec. 3710, Civ. C. 1895; re-en. Sec. 5695, Rev. C. 1907; re-en. Sec. 8210, R. C. M. 1921. Cal. Civ. C. Sec. 2858.

Cross-Reference

Banks may issue letters of credit, sec. 5-1001.

Collateral References

Banks and Banking ⇨ 191.
9 C.J.S. *Banks and Banking* §§ 175-183.
24 Am. Jur. 888, *Guaranty*, §§ 20-28.

30-602. (8211) How addressed. A letter of credit may be addressed to several persons in succession.

History: En. Sec. 3711, Civ. C. 1895; re-en. Sec. 5696, Rev. C. 1907; re-en. Sec. 8211, R. C. M. 1921. Cal. Civ. C. Sec. 2859.

30-603. (8212) Liability of the writer. The writer of a letter of credit is, upon the default of the debtor, liable to those who gave credit in compliance with its terms.

History: En. Sec. 3712, Civ. C. 1895; re-en. Sec. 5697, Rev. C. 1907; re-en. Sec. 8212, R. C. M. 1921. Cal. Civ. C. Sec. 2860.

Collateral References

24 Am. Jur. 890, *Guaranty*, § 23.

30-604. (8213) Letters of credit either general or special. A letter of credit is either general or special. When the request for credit in a letter is addressed to specified persons by name or description, the letter is special. All other letters of credit are general.

History: En. Sec. 3713, Civ. C. 1895;
re-en. Sec. 5698, Rev. C. 1907; re-en. Sec.
8213, R. C. M. 1921. Cal. Civ. C. Sec. 2861.

30-605. (8214) Nature of general letter of credit. A general letter of credit gives any person to whom it may be shown authority to comply with its request, and by his so doing it becomes, as to him, of the same effect as if addressed to him by name.

History: En. Sec. 3714, Civ. C. 1895;
re-en. Sec. 5699, Rev. C. 1907; re-en. Sec.
8214, R. C. M. 1921. Cal. Civ. C. Sec. 2862.

30-606. (8215) Extent of general letter of credit. Several persons may successively give credit upon a general letter.

History: En. Sec. 3715, Civ. C. 1895;
re-en. Sec. 5700, Rev. C. 1907; re-en. Sec.
8215, R. C. M. 1921. Cal. Civ. C. Sec. 2863.

30-607. (8216) A letter of credit may be a continuing guaranty. If the parties to a letter of credit appear, by its terms, to contemplate a course of future dealings between the parties, it is not exhausted by giving a credit, even to the amount limited by the letter, which is subsequently reduced or satisfied by payments made by the debtor, but is to be deemed a continuing guaranty.

History: En. Sec. 3716, Civ. C. 1895;
re-en. Sec. 5701, Rev. C. 1907; re-en. Sec.
8216, R. C. M. 1921. Cal. Civ. C. Sec. 2864.

Collateral References

Banks and Banking 191, and other
particular topics; Guaranty 38.
9 C.J.S. Banks and Banking §§ 175-183;
38 C.J.S. Guaranty § 7.

30-608. (8217) When notice of the writer necessary. The writer of a letter of credit is liable for credit given upon it without notice to him, unless its terms express or imply the necessity of giving notice.

History: En. Sec. 3717, Civ. C. 1895;
re-en. Sec. 5702, Rev. C. 1907; re-en. Sec.
8217, R. C. M. 1921. Cal. Civ. C. Sec. 2865.

30-609. (8218) The credit given must agree with the terms of the letter. If a letter of credit prescribes the persons by whom, or the mode in which, the credit is to be given, or the terms of credit, or limits the amount thereof, the writer is not bound except for transactions which, in these respects, conform strictly to the terms of the letter.

History: En. Sec. 3718, Civ. C. 1895;
re-en. Sec. 5703, Rev. C. 1907; re-en. Sec.
8218, R. C. M. 1921. Cal. Civ. C. Sec. 2866.

TITLE 31

HIGHWAY PATROL

- Chapter 1. Montana highway patrol—creation—powers and duties, 31-101 to 31-162.
2. Highway patrolmen's retirement system, 31-201 to 31-230.
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CHAPTER 1

MONTANA HIGHWAY PATROL—CREATION—POWERS AND DUTIES

- Section 31-101. Montana highway patrol created.
31-102. Board defined—chairman.
31-103. Organization—rules and regulations.
31-104. Supervisor—term—salary—supervisory power—resident requirement.
31-105. Qualifications of patrolmen—salary—probationary training—discharge—demotion—suspension—hearing.
31-106. Equipment of patrolmen.
31-107 to 31-109. Repealed.
31-110. Offenses for which arrest may be made by patrolmen—murder, etc.—patrolmen when police officers—forbidden to act in labor disputes or congregate to preserve peace in one county—temporary control of traffic in cities and towns—investigations of accidents—examination as to ability of person to operate vehicle—inspection of livestock.
31-111. Repealed.
31-112. Duty of patrolman upon making an arrest—power to fix and accept bail—fees of justices of peace.
31-113. Disposition of moneys.
31-114. Fees—fines and forfeitures.
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31-135. Licenses issued to operators and chauffeurs.
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31-138. Duplicate certificates.
31-139. Repealed.
31-140. Notice of change of address or name.
31-141. Records to be kept by the board.
31-142. Authority of board to cancel licenses.
31-143. Suspending privileges of nonresidents and reporting convictions.

- 31-144. Suspending resident's license upon conviction in another state.
- 31-145. When court to forward license to board and report convictions.
- 31-146. Mandatory revocation of license by board or supervisor upon proper authority.
- 31-147. Authority of board to suspend license or driving privilege or issue probationary license.
- 31-148. Board may require re-examination.
- 31-149. Period of suspension or revocation.
- 31-150. Surrender and return of license.
- 31-151. No operation under foreign license during suspension or revocation in this state.
- 31-152. Right of appeal to court.
- 31-153. Unlawful use of license.
- 31-154. Making false affidavit perjury.
- 31-155. Driving while license suspended or revoked.
- 31-156. Permitting unauthorized minor to drive.
- 31-157. Employing unlicensed chauffeur.
- 31-158. Renting motor vehicle to another.
- 31-159. Penalty for misdemeanor.
- 31-160. Uniformity of interpretation.
- 31-161. Short title.
- 31-162. Constitutionality.

31-101. Montana highway patrol created. There is hereby created a "Montana highway patrol" under the control and supervision of the Montana highway patrol board.

History: En. Sec. 1, Ch. 199, L. 1943.

NOTE.—Earlier Acts were Ch. 185, Laws 1935 appearing as sections 1741.2 to 1741.12, R. C. M. 1935, amended by Ch. 182, Laws 1937 and by Ch. 199, Laws 1943.

Cross-Reference

Accidents on highways, reports, sec. 32-1208.

Collateral References

Highways \hookrightarrow 92.
39 C.J.S. Highways § 162.

31-102. Board defined—chairman. The members of the state highway commission shall comprise the Montana highway patrol board and the chairman of the state highway commission shall be the chairman of the Montana highway patrol board.

History: En. Sec. 2, Ch. 199, L. 1943.

31-103. Organization—rules and regulations. The Montana highway patrol board shall maintain a permanent place of business at the state capital and shall meet at least once each month for the purpose of transacting its business. The Montana highway patrol shall provide for clerical help, provide for the maintenance of the patrol and for the employment and supervision of the patrol in conformity with the provisions of this act. The Montana highway patrol shall furnish the governor of the state of Montana with automobile transportation upon his request, provided that such transportation shall be limited to travel and transportation of the governor while on official business of the state of Montana.

History: En. Sec. 3, Ch. 199, L. 1943;
amd. Sec. 1, Ch. 55, L. 1945.

31-104. Supervisor—term—salary—supervisory power—resident requirement. The board shall select a highway patrol supervisor who shall hold his office until his appointment has terminated for cause, as herein-after set forth, and shall receive a salary of seven thousand dollars (\$7,000.00) per annum, and necessary traveling expenses. The super-

visor shall have direct control and supervision of all patrolmen, subject to the approval of the Montana highway patrol board. The person named as supervisor shall have been a continuous resident of Montana for at least five (5) years. The supervisor, with the approval of the board and within the limits of any appropriation made available for such purposes, shall for such Montana highway patrol:

1. Designate the authority and responsibility in each such rank, grade and position;
2. Formulate standards, policies and qualifications in the selection of recruit patrolmen;
3. Prescribe the official uniform of the Montana highway patrol;
4. Station employees in such localities as he shall deem advisable for the enforcement of the traffic laws of this state;
5. Charge against each employee the value of property of the state, lost or destroyed through the carelessness or neglect of such employee;
6. Discharge, demote, or temporarily suspend after hearing as provided in section 31-105, any employee of the department;
7. Have purchased, or otherwise acquired, by the purchasing department of the state, motor equipment and all other equipment and commodities deemed by him essential to the efficient operation of the Montana highway patrol.

History: En. Sec. 4, Ch. 199, L. 1943;
amd. Sec. 1, Ch. 102, L. 1957.

Collateral References

Highways 93, 94, 95(1).
39 C.J.S. Highways §§ 163-165, 167, 168.

31-105. Qualifications of patrolmen—salary—probationary training—discharge—demotion—suspension—hearing. The board shall designate captains, not to exceed six (6) in number, sergeants, and patrolmen in such numbers as the board may deem necessary. Said patrolmen shall be chosen in equal numbers in the twelve (12) highway districts, provided however, that if sufficient qualified applications are not received from any one district that the board may in its discretion substitute other qualified applicants from any other districts. Replacements and additions to the force shall be selected in the same manner. The salary of the captains, sergeants and patrolmen shall be fixed by the board, with the approval of the state board of examiners, provided that the base salary for captains shall be four hundred twenty-five dollars (\$425.00) per month, the base salary for sergeants shall be four hundred dollars (\$400.00) per month, the base salary for patrolmen shall be three hundred seventy-five dollars (\$375.00) per month, the base salary for probationary patrolmen shall be three hundred dollars (\$300.00) per month. In the event that said probationary patrolman is appointed permanently, he shall, at the time of such appointment, receive the base salary of patrolmen. These salaries shall be increased one per cent (1%) per year for each additional year of service. Captains and sergeants shall be selected from the patrolmen by the supervisor, subject to the approval of the highway patrol board. The duties and jurisdiction of the captains and sergeants shall be outlined, defined and under the control of the supervisor, subject to the approval

of the Montana highway patrol board. Provided, however, that when patrolmen work a forty-eight (48) hour week the base salaries shall be as follows: Captains, four hundred seventy-five dollars (\$475) per month: Sergeants, four hundred fifty dollars (\$450) per month: Patrolmen, four hundred twenty-five dollars (\$425) per month: Probationary patrolmen, three hundred fifty dollars (\$350) per month.

(a) Patrolmen shall possess the following qualifications:

- (1). Sound and active physical and mental condition.
- (2). Good moral character.
- (3). Resident of Montana for at least three (3) years last past.
- (4). Pass a satisfactory test in the operation of automobiles.
- (5). Not over fifty-five per cent (55%) of the patrol shall belong to one political party.
- (6). Citizens of the United States and state of Montana.

For the purpose of this act, the supervisor, captains, sergeants and patrolmen shall be deemed patrolmen. The Montana highway patrol board shall prepare a schedule of compensation and expenses for all patrolmen and submit it to the state board of examiners for their approval, in conformity with this act. All patrolmen shall be placed under probationary training and service for a period of six (6) months to one (1) year, during which time the highway patrol supervisor must recommend to the highway patrol board for permanent appointments or the patrolmen will automatically be dismissed. All captains and sergeants shall be placed under probationary training and service for a period of six (6) months to one (1) year, during which time the highway patrol supervisor must recommend to the highway patrol board for permanent appointments or the captains and sergeants will automatically revert to their previous ranks without prejudice. Patrolmen filling vacancies caused by the incumbents' entrance into the armed forces of the United States, shall, on the return of the incumbents be placed in the patrol reserve, without pay; otherwise they shall hold their permanent appointments while there are sufficient operating funds. Reserve patrolmen shall then be used for future replacements in the permanent patrol.

Every person employed or appointed and designated as a supervisor, captain, sergeant, or patrolman under and pursuant to the provisions of this act, except as above provided, shall continue in service and hold his position without demotion until suspended, demoted, or discharged in the manner hereinafter provided, for one or more of the causes specified in the following paragraph.

(b) Cause for suspension, demotion, or discharge will be:

- (1). Conviction of any crime involving moral turpitude in any court of competent jurisdiction subsequent to the commencement of such employment.
- (2). Gross neglect of duty or willful violation or disobedience of orders or regulations.
- (3). Loitering about or entering places of ill fame, ill repute, or where gambling is known to be conducted or to be in progress, except in the immediate discharge of duty.

- (4). Conduct unbecoming an officer.
- (5). Drinking intoxicating liquor while using state-owned cars or in uniform, or being intoxicated in a public place.
- (6). Sleeping while on duty.
- (7). Incapacity, or partial incapacity, materially affecting his ability to perform his official duties.
- (8). Gross inefficiency in performing duties.
- (9). Active participation in any political campaign by supporting or opposing, directly or indirectly, any political candidate, or contributing financially or otherwise, directly or indirectly, to the success or defeat of any political party or candidate.
- (10). Willful disobedience of rules and regulations adopted by the board, governing the conduct and discipline of members of the patrol.

The charge or charges against any such employee shall be made in writing and shall be signed and sworn to by the person making the same, which written charge or charges shall be filed with the supervisor of the Montana highway patrol. Any charges involving suspension or dismissal of the supervisor or a captain shall be filed directly with the highway patrol board.

Upon the filing of the same, if the supervisor, in his opinion, believes that such charges constitute grounds for discharge, he shall order a hearing to be had thereon before the highway patrol board and fix a time for such hearing, otherwise he shall dismiss such charges.

(c) At least ten (10) days before the time appointed for said hearing, written notice specifying the charge or charges filed and stating the name of the person or persons making the charge or charges shall be served on the said employee personally, if his whereabouts is known, in the state of Montana. If at the time, the whereabouts of the said employee is unknown, or if he be outside of the state of Montana, service may be made upon him by mailing the said written notice to him at his last known place of residence in Montana.

If the supervisor orders a hearing he may suspend such employee pending the rendition of the decision made in such case.

The highway patrol board shall be the authority to hear such charge or charges and render a decision and appropriate order.

The highway patrol board shall have the power to compel the attendance of witnesses at any such hearing and to examine them under oath and to require the production of books, papers, and other evidence at such hearing and for that purpose issue subpoenas and cause the same to be served and executed in any part of the state.

The employee accused shall be entitled to be confronted with the witnesses against him and have an opportunity to cross-examine the same and to introduce at such hearing testimony in his own behalf and shall be entitled to be represented by counsel at such hearing. The highway patrol board shall within fifteen (15) days after such hearing render its decision in writing and file same in its office with the supervisor and with the employee accused also.

If, after such hearing, the highway patrol board finds that any such charge or charges made against the employee are true, it may punish the

offending party by reprimand, suspension without pay, demotion, or dismissal.

(d) Any employee who is so suspended, demoted, or dismissed may have a right of appeal to the district court of Lewis and Clark county, within ten (10) days after such decision or determination of the highway patrol board, and said court shall review such decision or determination in a summary manner and shall render its decision upon such appeal within ninety (90) days from the filing of such appeal in said court. If such decision or determination of the highway patrol board shall be finally reversed or modified by said court, the said employee shall be reinstated in his position and the highway patrol board shall pay to the said employee any salary or wages withheld from him pending the determination of the charge or charges, or as may be directed by the court.

The highway patrol board shall have the authority to order the supervisor to file charges with the board if the supervisor in his judgment does not believe the charge or charges warrant a hearing.

When the highway patrol supervisor has cause to believe that any member of the highway patrol has violated any of the hereinabove specified grounds for suspension, demotion or discharge, or his conduct has warranted reprimanding, he may, with the approval of the Montana highway patrol board, suspend, demote or reprimand the member. Suspension shall be without pay and for a period not to exceed twenty (20) days in time. In cases of demotion, the member shall receive the pay of the classification to which he is demoted.

History: En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959.

Collateral References

Highways—93.
39 C.J.S. Highways §§ 163-166.

Assertion of immunity as ground for discharging police officer. 44 ALR 2d 796.

31-106. Equipment of patrolmen. The highway patrol board shall furnish patrolmen with automobiles equipped and fitted with a distinctive siren and a particularly designated light for use at night. The patrol board shall furnish all patrolmen with uniforms and equipment necessary for the performance of their respective duties, with the approval of the captain of their respective districts: provided that any such equipment and uniforms shall remain the property of the state of Montana: provided further, that the said board shall have authority to destroy, sell, or dispose of any and all obsolete equipment or uniforms or parts thereof, and any moneys received therefrom shall be paid into the state general fund.

History: En. Sec. 6, Ch. 199, L. 1943; amd. Sec. 1, Ch. 31, L. 1955.

Collateral References

Highways—95(1).
39 C.J.S. Highways § 168.

31-107 to 31-109. Repealed—Chapter 263, Laws of 1955.

Repeal

These sections (Secs. 7 to 9, Ch. 199, L. 1943; Sec. 1, Ch. 94, L. 1949; Sec. 1, Ch. 118, L. 1949), relating to speed limits, criminal acts on highways and penalties

therefor, were repealed by Sec. 158, Ch. 263, Laws 1955, effective July 1, 1955. For new provisions, see chapter 21 of title 32.

31-110. Offenses for which arrest may be made by patrolmen—murder, etc.—patrolmen when police officers—forbidden to act in labor disputes or congregate to preserve peace in one county—temporary control of traffic in cities and towns—investigations of accidents—examination as to ability of person to operate vehicle—inspection of livestock. In addition to the above duties, the highway patrol supervisor and all patrolmen are authorized under this act to make arrests for the following offenses committed; if committed in the presence of said supervisor or any of said patrolmen, or if committed in a rural district, upon the request of a peace officer, or if committed in a city or town of less than twenty-five hundred (2500) inhabitants, upon the request of any peace officer, or the mayor of said city or town: The crimes of murder, assault with a deadly weapon, arson, burglary, larceny, kidnaping, illegal transportation of narcotics, or violation of the Dyer act regarding the transportation of stolen automobiles. Provided, that such highway patrolmen shall have no authority and are expressly forbidden to make arrests in labor disputes or in preventing violence in connection with strikes, and shall not be permitted to perform any duties whatsoever in connection with labor disputes, strikes or boycotts, and shall not be permitted to congregate or act as a unit in one county to suppress riots or preserve the peace.

Patrolmen shall be deemed police officers in making arrests in all offenses occurring on the highways and in the use of motor vehicles or the registration thereof, and for the purpose of serving warrants of arrest in connection with such violations.

The highway patrol shall have the authority to examine any person operating a motor vehicle, who is a repeated violator of traffic regulations or who appears to be mentally or physically deficient, to determine his ability to operate a motor vehicle, and if, after such examination, it reasonably appears to said examiner that said person is unsafe or unfit to operate a motor vehicle, the examiner may recommend to the justice court or district court for issuance of an order prohibiting such person from operating any motor vehicle and revoking his driver's license. A written copy of the order shall be delivered to the registrar of motor vehicles, who shall repossess such person's driver's license and refuse to sell a driver's license to such person until the receipt of instructions from the highway patrol that said order of revocation has been canceled.

The patrolmen are also hereby empowered to stop any truck or motor vehicle in which livestock or livestock products are being transported and ascertain whether the driver of such truck or vehicle is rightfully in possession of such livestock or livestock products; and whenever the patrolmen have good reason to believe that such livestock or livestock products have been stolen, they are empowered to take possession of the same until such livestock or livestock products can be delivered into the custody of the sheriff or until such time as the facts as to the actual ownership can be ascertained.

History: En. Sec. 10, Ch. 199, L. 1943.

licenses, which were enacted subsequent to the above section.

NOTE.—See also sections 31-142 to 31-152, relating to revocation of drivers'

Collateral References

Highways 95(1).
39 C.J.S. Highways § 168.

Personal liability of policeman, or his bond, for negligently causing personal injury or death. 60 ALR 2d 873.

31-111. Repealed—Chapter 102, Laws of 1959.

Repeal

This section (Sec. 11, Ch. 199, L. 1943), relating to the requirement of a driver's license, the fee therefor and prohibiting

certain persons from obtaining license, was repealed by Sec. 1, Ch. 102, Laws 1959.

31-112. Duty of patrolman upon making an arrest—power to fix and accept bail—fees of justices of peace. Patrolmen, upon making an arrest, shall either deliver the offender to the nearest justice of the peace during office hours, or to the county jail, or in lieu thereof, deliver to the offender a form of summons describing the nature of the offense with instructions thereon for the offender to report to the nearest justice of the peace, or in lieu of reporting to the nearest justice of the peace, the patrolman has the right to set and accept a deposit for appearance justifiable for the offense charged. In the event the patrolman sets and accepts bail, he shall give a signed receipt to the offender setting forth the amount received. The patrolman shall then deliver the bail money to the justice of the peace before whom the offender is to appear, and the justice of the peace shall give a receipt to the patrolman for the amount of bail money delivered. After filing of the complaint and appearance of the defendant, the justice of the peace shall assume jurisdiction and may set, fix and accept further appearance bail bond.

For the purpose of this act only, the fees of justices of the peace in all offenses in which the statutory fine is five dollars (\$5.00) or less, shall be one dollar (\$1.00), but if the statutory fine is in excess of five dollars (\$5.00), the justices of the peace shall be permitted the fee now prescribed by law; provided that no additional fees shall be paid justices of the peace where salaries are fixed by law.

History: En. Sec. 12, Ch. 199, L. 1943.

31-113. Disposition of moneys. The state treasurer shall deposit to the credit of the state general fund all moneys received by him from the collection of motor vehicle driver's license fees under section 31-111.

History: En. Sec. 13, Ch. 199, L. 1943.

repealed by Sec. 1, Ch. 102, Laws 1959.
Present fee provisions are contained in section 31-135.

Compiler's Note

Section 31-111, referred to above, was

31-114. Fees—fines and forfeitures. All fees, fines and forfeitures collected in any court from persons apprehended or arrested by patrolmen for violation of this act and the laws and regulations relating to the use of state highways and the operation of vehicles thereon must be paid to the state treasurer of Montana and by him credited to the general fund of the state; and at the time of payment of any such fee, fine or forfeiture there shall be filed with the state treasurer a complete statement showing the total of the fees, fines or forfeitures received or incurred, which statement shall give the title of the court and cause and be subscribed to by the person or officer making such payments.

History: En. Sec. 14, Ch. 199, L. 1943.

31-115. Court costs—fees and expenses of counties. The court, after deducting all costs and fees, shall immediately transmit the balance of said fine to the state treasurer as provided by law. The expenses of the county, except fees of officers who are paid a regular salary, shall constitute a proper claim against the state of Montana and said claim or claims shall be paid in the manner provided by law out of the funds appropriated for such purposes.

History: En. Sec. 15, Ch. 199, L. 1943.

31-116. Reports. Justices of the peace and county treasurers shall furnish to the highway patrol statements of all fees, fines and forfeitures and records of cases which involve the state highway patrol as the board may request.

History: En. Sec. 16, Ch. 199, L. 1943.

31-117. Drivers' examination section of highway patrol. There is hereby created a drivers' examination section of the Montana highway patrol, under the direct control and supervision of the Montana highway patrol board. Said board shall maintain a permanent place of business at the state capitol and shall meet at least once each month for the purpose of transacting business either as the drivers' examining board, the highway patrol board, or jointly for the two. The board shall select a chief examiner, and as many assistant chief examiners, and examiners as it deems necessary and shall provide for the necessary clerical help.

The chief examiner, assistant chief examiners, and all examiners shall have the same qualifications as are required for members of the Montana highway patrol. The chief examiner shall rank as a captain, the assistant chief examiners shall rank as sergeants, and the examiners shall rank as patrolmen.

History: En. Sec. 1, Ch. 267, L. 1947;
amd. Sec. 1, Ch. 141, L. 1951; amd. Sec.
1, Ch. 101, L. 1957.

31-118. Definitions. The following words and phrases when used in this act shall, for the purpose of this act, have the meanings respectively ascribed to them in sections 31-119 to 31-124.

History: En. Sec. 2, Ch. 267, L. 1947.

31-119. Vehicle—motor vehicle—farm tractor—school bus. (a) Vehicle. Every device in, upon, or by which any person or property is or may be transported or drawn upon a public highway, excepting devices moved by human or animal power or used exclusively upon stationary rails or tracks.

(b) Motor vehicle. Every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails.

(c) Farm tractor. Every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines, and other implements of husbandry.

(d) School bus. Every motor vehicle owned by a public or governmental agency and operated for the transportation of children to or from school or privately owned and operated for compensation for the transportation of children to or from school.

History: En. Sec. 3, Ch. 267, L. 1947.

31-120. Person—operator—chauffeur—owner. (a) Person. Every natural person, firm, copartnership, association, or corporation.

(b) Operator. Every person, other than a chauffeur, who drives or is in actual physical control of a motor vehicle upon a highway or who is exercising control over or steering a vehicle being towed by a motor vehicle.

(c) Chauffeur. Every person who is employed by another for the principal purpose of driving a motor vehicle and every person who drives a school bus transporting school children or any motor vehicle when in use for the transportation of persons or property for compensation, but shall not include persons driving farm trucks or hauling farm products for producers of said farm products.

(d) Owner. A person who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with the immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this act.

History: En. Sec. 4, Ch. 267, L. 1947.

31-121. Nonresident. Every person who is not a resident of this state.
History: En. Sec. 5, Ch. 267, L. 1947.

31-122. Street or highway. The entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel.

History: En. Sec. 6, Ch. 267, L. 1947.

31-123. Supervisor—board. (a) Supervisor. The supervisor of the Montana highway patrol.

(b) Board. The Montana highway patrol board acting directly or through its duly authorized officers or agents.

History: En. Sec. 7, Ch. 267, L. 1947.

31-124. Suspension, revocation and cancellation. (a) Suspension means that the driver's license and privilege to drive a motor vehicle on the public highways are temporarily withdrawn but only during the period of such suspension.

(b) Revocation means that the driver's license and privilege to drive a motor vehicle on the public highways are terminated and shall not be renewed or restored. An application for a new license may be presented and acted upon by the board after the expiration of the period of such revocation or suspension.

(c) Cancellation means that a driver's license is annulled and terminated because of some error or defect or because the licensee is no longer entitled to such license, but the cancellation of a license is without prejudice and application for a new license may be made at any time after such cancellation.

History: En. Sec. 8, Ch. 267, L. 1947;
amd. Sec. 1, Ch. 110, L. 1961.

31-125. Operators and chauffeurs must be licensed. (a) No person, except those hereinafter expressly exempted, under section 31-126, shall drive any motor vehicle upon a highway in this state unless such person has a valid Montana license as an operator or chauffeur under the provisions of this act. No person shall receive an operator's or chauffeur's license unless and until he surrenders to the board all valid operators' and chauffeurs' licenses in his possession issued to him by any other jurisdiction. All surrendered licenses shall be returned by the board to the issuing department together with information that licensee is now licensed in this state. No person shall be permitted to have more than one (1) valid operator's or chauffeur's license at any time. No person shall drive a motor vehicle as a chauffeur unless he holds a valid chauffeur's license. No person shall receive a chauffeur's license unless and until he surrenders to the board any operator's license issued to him or an affidavit that he does not possess an operator's license.

(b) Any person holding a valid chauffeur's license hereunder need not procure an operator's license.

(c) Whenever a city or town requires an operator or chauffeur to obtain a local driving license or permit, such a license or permit shall not be issued unless applicant therefor presents a state driver's license valid under the provisions of this act.

(d) Provided further, that any person who has resided in this state for a period exceeding ninety (90) days is considered to be a resident for the purpose of being licensed to drive a motor vehicle and must thereafter be licensed to drive motor vehicles under the laws of this state.

History: En. Sec. 9, Ch. 267, L. 1947;
amd. Sec. 1, Ch. 37, L. 1951; amd. Sec. 1,
Ch. 79, L. 1957; amd. Sec. 1, Ch. 51, L.
1959; amd. Sec. 1, Ch. 211, L. 1961.

Collateral References

Lack of proper automobile registration
or operator's license as evidence of oper-
ator's negligence. 29 ALR 2d 963.

31-126. What persons are exempt from license. The following persons are exempt from license hereunder:

1. Any person who is a member of the armed forces of the United States while operating a motor vehicle owned by or leased to the United States government and being operated on official business;

2. Any person while driving or operating any road machine, farm tractor, or implement of husbandry temporarily operated or moved on a highway;

3. A nonresident who is at least fifteen (15) years of age and who has in his immediate possession a valid operator's license issued to him in

his home state or country may operate a motor vehicle in this state only as an operator;

4. A nonresident who is at least eighteen (18) years of age and who has in his immediate possession a valid chauffeur's license issued to him in his home state or country may operate a motor vehicle in this state either as an operator or chauffeur subject to the age limits applicable to chauffeurs in this state except that any such person must be licensed as a chauffeur hereunder before accepting employment as a chauffeur from a resident of this state;

5. Any nonresident who is at least eighteen (18) years of age, whose home state or country does not require the licensing of operators, may operate a motor vehicle as an operator only, for a period of not more than ninety (90) days in any calendar year, if the motor vehicle so operated is duly registered in the home state or country of such nonresident.

6. A driver's license issued hereunder to any person who enters the United States armed forces, if valid and in force and effect at the time such person enters the service, shall continue in full force and effect so long as such service shall continue unless such license is sooner suspended, revoked or canceled for a cause as provided by law, and for not to exceed thirty (30) days following the date on which holder of such driver's license is honorably separated from such service. During said thirty (30) day period, such license shall be valid only when in the immediate possession of the licensee while driving and the licensee has his discharge, separation, leave or furlough papers in his immediate possession.

History: En. Sec. 10, Ch. 267, L. 1947;
amd. Sec. 1, Ch. 95, L. 1955; amd. Sec. 1,
Ch. 137, L. 1961.

31-127. What persons shall not be licensed. The board shall not issue any license hereunder:

1. To any person, as an operator, who is under the age of fifteen (15) years, except that the board may issue a restricted license as hereinafter provided to any person who is at least thirteen (13) years of age;

2. To any person, as a chauffeur, employed by another for the principal purpose of driving a motor vehicle when in use exclusively for the transportation of property for compensation, who is under the age of eighteen (18) years, nor to any person, as a chauffeur, who is employed by another for the principal purpose of driving a motor vehicle transporting passengers for hire or transporting school children, who is under the age of twenty-one (21) years;

3. To any person, as an operator or chauffeur, whose license has been suspended during such suspension, nor to any person whose license has been revoked, except as provided in section 31-149;

4. To any person, as an operator or chauffeur, who is an habitual drunkard, or is addicted to the use of narcotic drugs;

5. To any person, as an operator or chauffeur, who has previously been adjudged to be afflicted with or suffering from any mental disability

or disease and who has not at the time of application been restored to competency by the methods provided by law;

6. To any person, as an operator or chauffeur, who is required by this act to take an examination, unless such person shall have successfully passed such examination;

7. To any person who is required under the provisions of the motor vehicle financial responsibility laws of this state to deposit proof of financial responsibility and who has not deposited such proof;

8. To any person as an operator or chauffeur, who is suffering from any form of epileptic type seizures or similar disorders characterized by lapse of consciousness or control, either temporary or prolonged, which is or may become chronic: provided that the board may in its discretion issue a license to a person suffering from epileptic type seizures or similar disorder characterized by lapse of consciousness or control, if otherwise qualified to be licensed to drive a motor vehicle, when the afflicted person can show that he has not experienced an epileptic type seizure or similar disorder characterized by lapse of consciousness or control for a period of two (2) years and when recommended by the state health officer as being controlled medically or otherwise to the degree that the affliction will not interfere with the safe operation of a motor vehicle.

History: En. Sec. 11, Ch. 267, L. 1947;
amd. Sec. 1, Ch. 60, L. 1955.

Cross-Reference

Reports of persons subject to epileptic type seizures, sec. 69-127.

31-128. Classification of chauffeurs—special restrictions. (a) The board upon issuing a chauffeur's license shall indicate thereon the class of license so issued and shall appropriately examine each applicant according to the class of license applied for and may impose such rules and regulations for the exercise thereof as it may deem necessary for the safety and welfare of the traveling public.

(b) No person who is under the age of twenty-one (21) years shall drive any school bus transporting school children or any motor vehicle when in use for the transportation of persons for compensation nor in either event until he has been licensed as a chauffeur for either such purpose and the license so indicates. The board shall not issue a chauffeur's license for either such purpose unless the applicant has had at least one (1) year of driving experience prior thereto and has filed with the board one (1) or more certificates signed by a total of at least three (3) responsible people to whom he is well known certifying as to his good character and habits and the board is fully satisfied as to the applicant's competency and fitness to be employed.

History: En. Sec. 12, Ch. 267, L. 1947.

31-129. Instruction permits and temporary licenses. (a) Any person who is at least fifteen (15) years of age may apply to the board for an instruction permit. The board may in its discretion, after the applicant has successfully passed all parts of the examination other than the driving test, issue to the applicant an instruction permit which shall entitle the applicant, while having such permit in his immediate possession, to drive a motor vehicle upon the public highways for a period of six (6) months

when accompanied by a licensed operator or chauffeur who is occupying a seat beside the driver, except in the event the permittee is operating a motorcycle.

(b) The board upon receiving proper application may in its discretion issue a restricted instruction permit effective for a school year or more restricted period to an applicant who is enrolled in a driver-training program approved by the board even though the applicant has not reached the legal age to be eligible for an operator's license. Such instruction permit shall entitle the permittee when he has such a permit in his immediate possession to operate a motor vehicle only on a designated highway or within a designated area but only when an approved instructor is occupying a seat beside the permittee.

(c) The board may in its discretion issue a temporary driver's permit to an applicant for an operator's license permitting him to operate a motor vehicle while the board is completing its investigation and determination of all facts relative to such applicant's right to receive an operator's license. Such permit must be in his immediate possession while operating a motor vehicle, and it shall be invalid when the applicant's license has been issued or for good cause has been refused.

History: En. Sec. 13, Ch. 267, L. 1947;
amd. Sec. 1, Ch. 120, L. 1961.

31-130. Application for license or instruction permit. (a) Every application for an instruction permit or for an operator's or chauffeur's license shall be made upon a form furnished by the board. Every application shall be accompanied by the proper fee and payment of such fee shall entitle the applicant to not more than three attempts to pass the examination within a period of 6 months from the date of application.

(b) Every such application shall state the full name, date of birth, sex, and residence address of the applicant, and briefly describe the applicant, and shall state whether the applicant has theretofore been licensed as an operator or chauffeur, and, if so, when and by what state or country, and whether any such license has ever been suspended or revoked, or whether an application has ever been refused, and, if so, the date of and reason for such suspension, revocation, or refusal.

History: En. Sec. 14, Ch. 267, L. 1947.

31-131. Application of minors. (a) The application of any person under the age of eighteen (18) years for an instruction permit or operator's license shall be signed and verified before a person authorized to administer oaths by both the father and mother of the applicant, if both are living and have custody of him, or by the surviving parent, or in the event neither parent is living or has custody, then by the person or guardian having such custody or by an employer of such minor, or in the event there is no guardian or employer then by other responsible person who is willing to assume the obligation imposed under this act upon a person signing the application of a minor.

(b) Any negligence or willful misconduct of a minor under the age of eighteen (18) years when driving a motor vehicle upon a highway shall

be imputed to a person who has signed the application of such minor for a permit or license, which person shall be jointly and severally liable with such minor for any damages caused by such negligence or willful misconduct (except as otherwise provided in subparagraph (c) of this section).

(c) In the event a minor deposits or there is deposited upon his behalf proof of financial responsibility in respect to the operation of a motor vehicle owned by him, or if not the owner of a motor vehicle, then with respect to the operation of any motor vehicle, in form and in amounts as required under the motor-vehicle financial responsibility laws of this state, then the board may accept the application of such minor when signed by one parent or the guardian of such minor, and while such proof is maintained such parent or guardian shall not be subject to the liability imposed under subparagraph (b) of this section.

History: En. Sec. 15, Ch. 267, L. 1947;
amd. Sec. 1, Ch. 140, L. 1961.

Collateral References

Construction and effect of statutes which make parent, custodian, or other person signing minor's application for vehicle operator's license liable for licensee's negligence or willful misconduct. 26 ALR 2d 1320.

Proof of Financial Responsibility

Where subdivision (c) of this section is not resorted to at the time application for license is made, subdivision (b) applies and a defendant who signed the application of a minor is liable for damages caused by the minor's negligence. Moore v. Jacobsen, 127 M 341, 263 P 2d 713, 717.

31-132. Release from liability. Any person who has signed the application of a minor for a license may thereafter file with the board a verified written request that the license of said minor so granted be canceled. Thereupon the board shall cancel the license of said minor and the person who signed the application of such minor shall be relieved from the liability imposed under this act by reason of having signed such application on account of any subsequent negligence or willful misconduct of such minor in operating a motor vehicle.

History: En. Sec. 16, Ch. 267, L. 1947.

31-133. Cancellation of license upon death of person signing minor's application. The board upon receipt of satisfactory evidence of the death of the persons who signed the application of a minor for a license shall cancel such license and shall not issue a new license until such time as a new application, duly signed and verified, is made as required by this act. This provision shall not apply in the event the minor has attained the age of eighteen (18) years.

History: En. Sec. 17, Ch. 267, L. 1947.

31-134. Examination of applicants. (a) The board shall examine every applicant for an operator's or chauffeur's license, except as otherwise provided in this section. Such examination shall include a test of the applicant's eyesight, his ability to read and understand highway signs regulating, warning, and directing traffic, his knowledge of the traffic laws of this state, and shall include an actual demonstration of ability to exercise ordinary and reasonable control in the operation of a motor vehicle.

The board shall make provision for giving an examination either in the county where the applicant resides or at a place adjacent thereto reasonably convenient to the applicant within not more than thirty (30) days from the date the application is received.

(b) The board shall issue without examination an operator's license to any person applying therefor within six (6) months after this section takes effect who furnishes evidence satisfactory to the board that he is not disqualified under the provisions of this act and that he has previously operated a motor vehicle in a satisfactory manner for a period of not less than one (1) year.

History: En. Sec. 18, Ch. 267, L. 1947.

31-135. Licenses issued to operators and chauffeurs. (a) The highway patrol board shall have authority to appoint county treasurers and other qualified officers to act as its agent or agents for the sale of driver's licenses, and shall make necessary rules and regulations governing such sales. The board shall, upon payment of four dollars (\$4.00); issue to every applicant qualifying therefor, an operator's or chauffeur's license as applied for, which license shall be purchased biennially on or before the operator's or chauffeur's birthday, and shall expire on the anniversary of the date of birth of the operator or chauffeur, two (2) years or less after the date of issue, and shall contain a photograph of such licensee in such size and form as may be prescribed by the highway patrol board, a distinguishing number issued to the licensee, the full name, date of birth, resident address, and a brief description of the licensee and either a facsimile of the signature of the licensee or a space upon which he shall write his signature in pen and ink, immediately upon receipt of the license. No license shall be valid until it has been so signed by the licensee.

(b) Every operator's or chauffeur's license issued hereunder shall be valid for a term of two (2) years, except as otherwise provided, and shall be renewed for a like period on or before the second anniversary of the licensee's date of birth next succeeding date of issue for a further period of two (2) years from such anniversary, upon receipt of the application and fee as in the case of original application as provided herein. Notwithstanding the foregoing provisions the highway patrol board shall change the expiration dates to a system of staggered expiration dates based on the anniversary date of birth of the applicant and shall collect additional fees as hereinafter provided.

(c) Whenever the board issues an original license to a person under the age of twenty-one (21) years, such license shall be designated and clearly marked as a "provisional license." Any license so designated and marked may be suspended by the board for a period of not more than twelve (12) months, when its record discloses that the licensee, subsequent to the issuance of such license, has been guilty of careless or negligent driving. Upon renewal as applicable to operator's licenses, the board may for any reasonable cause, as shown by its records, designate the renewal of the license as provisional, otherwise, a license in usual form shall be issued subject to other provisions of the laws of Montana.

(d) It shall be unlawful for any person to have in his possession or under his control, more than one (1) Montana operator's or chauffeur's license at any one time.

History: En. Sec. 19, Ch. 267, L. 1947; Ch. 130, L. 1953; amd. Sec. 1, Ch. 249, amd. Sec. 1, Ch. 135, L. 1951; amd. Sec. 1, L. 1961.

31-136. License to be carried and exhibited on demand. Every licensee shall have his operator's or chauffeur's license in his immediate possession at all times when operating a motor vehicle and shall display the same upon demand of a justice of the peace, a peace officer, a highway patrolman, or a field deputy or inspector of the board. However, no person charged with violating this section shall be convicted if he produces in court or the office of the arresting officer an operator's or chauffeur's license theretofore issued to him and valid at the time of his arrest.

History: En. Sec. 20, Ch. 267, L. 1947.

31-137. Restricted licenses. (a) The board upon issuing an operator's or chauffeur's license shall have authority whenever good cause appears to impose restrictions suitable to the licensee's driving ability with respect to the type of or special mechanical control devices required on a motor vehicle which the licensee may operate or such other restrictions applicable to the licensee as the board may determine to be appropriate to assure the safe operation of a motor vehicle by the licensee.

(b) The board may either issue a special restricted license or may set forth such restrictions upon the usual license form.

(c) The board may upon receiving satisfactory evidence of any violation of the restrictions of such license suspend or revoke the same but the licensee shall be entitled to a hearing as upon suspension or revocation under this act.

(d) It is a misdemeanor for any person to operate a motor vehicle in any manner in violation of the restrictions imposed in a restricted license issued to him.

History: En. Sec. 21, Ch. 267, L. 1947.

31-138. Duplicate certificates. In the event that an instruction permit or operator's or chauffeur's license issued under the provisions of this act is lost or destroyed, the person to whom the same was issued may, upon the payment of a fee of fifty cents (50c), obtain a duplicate, or substitute thereof, upon furnishing proof satisfactory to the board that such permit or license has been lost or destroyed.

History: En. Sec. 22, Ch. 267, L. 1947;
amd. Sec. 1, Ch. 36, L. 1953.

31-139. Repealed—Chapter 135, Laws of 1951.

Repeal

This section (Sec. 23, Ch. 267, L. 1947), relating to the expiration of operators' and chauffeurs' licenses, was repealed by Sec. 2, Ch. 135, Laws 1951. See sec. 31-135.

31-140. Notice of change of address or name. Whenever any person after applying for or receiving an operator's or chauffeur's license shall move from the address named in such application or in the license issued

to him or when the name of a licensee is changed by marriage or otherwise such person shall within ten (10) days thereafter notify the board in writing of his old and new addresses or of such former and new names and of the number of any license then held by him.

History: En. Sec. 24, Ch. 267, L. 1947.

31-141. Records to be kept by the board. (a) The board shall file every application for a license received by it and shall maintain suitable indexes containing, in alphabetical order:

1. All applications denied and on each thereof note the reasons for such denial;

2. All applications granted; and

3. The name of every licensee whose license has been suspended or revoked by the board and after each such name note the reasons for such action.

(b) The board shall also file all accident reports and abstracts of court records of convictions received by it under the laws of this state and in connection therewith maintain convenient records or make suitable notations in order that an individual record of each licensee showing the convictions of such licensee and the traffic accidents in which he has been involved shall be readily ascertainable and available for the consideration of the board upon any application for renewal of license and at other suitable times.

History: En. Sec. 25, Ch. 267, L. 1947.

31-142. Authority of board to cancel licenses. (a) The board is hereby authorized to cancel any operator's or chauffeur's license upon determining that the licensee was not entitled to the issuance thereof hereunder or that said licensee failed to give the required or correct information in his application or committed any fraud in making such application.

(b) Upon such cancellation, the licensee must surrender the license so canceled to the board.

History: En. Sec. 26, Ch. 267, L. 1947.

31-143. Suspending privileges of nonresidents and reporting convictions. (a) The privilege of driving a motor vehicle on the highways of this state given to a nonresident hereunder shall be subject to suspension or revocation by the board in like manner and for like causes as an operator's or chauffeur's license issued hereunder may be suspended or revoked.

(b) The board is further authorized, upon receiving a record of the conviction in this state of a nonresident driver of a motor vehicle of any offense under the motor-vehicle laws of this state, to forward a certified copy of such record to the motor vehicle administrator in the state wherein the person so convicted is a resident.

History: En. Sec. 27, Ch. 267, L. 1947.

31-144. Suspending resident's license upon conviction in another state. The board is authorized to suspend or revoke the license of any resident of this state or the privilege of a nonresident to drive a motor vehicle in

this state upon receiving notice of the conviction of such person in another state of an offense therein which, if committed in this state, would be grounds for the suspension or revocation of the license of an operator or chauffeur.

History: En. Sec. 28, Ch. 267, L. 1947.

31-145. When court to forward license to board and report convictions.

(a) Whenever any person is convicted of any offense for which this act makes mandatory the revocation of the operator's or chauffeur's license of such person by the board, the court in which such conviction is had shall require the surrender to it of all operator's and chauffeur's licenses then held by the person so convicted. The court shall thereupon forward said license to the board and at the same time forward a record of such conviction to the board, providing that if such person does not possess a driver's license the court shall so indicate in its report to the board.

(b) Every court having jurisdiction over offenses committed under this act, or any other act of this state or municipal ordinance regulating the operation of motor vehicles on highways, shall forward to the board a record of the conviction or forfeiture of bail, not vacated, of any person in said court for a violation of any said laws other than regulations governing standing or parking, and may recommend the suspension of the operator's or chauffeur's license of the person so convicted.

(c) For the purposes of this act the term "conviction" shall mean a final conviction. Also, for the purposes of this act a forfeiture of bail or collateral deposited to secure a defendant's appearance in court, which forfeiture has not been vacated, shall be equivalent to a conviction.

(d) Any person convicted of any offense which makes mandatory the revocation of the operator's or chauffeur's license, such period of revocation shall commence from date of conviction or forfeiture of bail.

History: En. Sec. 29, Ch. 267, L. 1947;
amd. Sec. 1, Ch. 165, L. 1957; amd. Sec. 1,
Ch. 27, L. 1961.

31-146. Mandatory revocation of license by board or supervisor upon proper authority. The board or supervisor upon proper authority shall forthwith revoke the license or operating privilege of any operator or chauffeur upon receiving a record of such operator's or chauffeur's conviction or forfeiture of bail not vacated of any of the following offenses, when such conviction or forfeiture has become final:

1. Manslaughter resulting from the operation of a motor vehicle;
2. Driving a motor vehicle while under the influence of intoxicating liquor or narcotic drug or a combination thereof;
3. Any felony in the commission of which a motor vehicle is used;
4. Failure to stop and render aid as required under the laws of this state in the event of a motor-vehicle accident resulting in the death or personal injury of another;
5. Perjury or the making of a false affidavit or statement under oath to the board under this act or under any other law relating to the ownership or operation of motor vehicles;

6. Conviction, or forfeiture of bail not vacated, upon three (3) charges of reckless driving committed within a period of twelve (12) months.

History: En. Sec. 30, Ch. 267, L. 1947;
amd. Sec. 1, Ch. 192, L. 1957; amd. Sec. 1,
Ch. 125, L. 1961.

31-147. Authority of board to suspend license or driving privilege or issue probationary license. (a) The board is hereby authorized to suspend the license or driving privilege of an operator or chauffeur without preliminary hearing upon a showing by its records or other sufficient evidence that the licensee:

1. Has committed an offense for which mandatory revocation of license is required upon conviction;

2. Has been involved as a driver in any accident resulting in the death or personal injury of another or serious property damage;

3. Has been convicted with such frequency of serious offenses against traffic regulations governing the movement of vehicles as to indicate a disrespect for traffic laws and a disregard for the safety of other persons on the highways;

4. Is an habitually reckless or negligent driver of a motor vehicle;

5. Is incompetent to drive a motor vehicle;

6. Has permitted an unlawful or fraudulent use of such license;

7. Has committed an offense in another state which if committed in this state would be grounds for suspension or revocation; or

8. Has falsified his date of birth on his application for a driver's license.

(b) Provided, however, the board may, in its discretion, and in lieu of such suspension of license or driving privilege, issue a probationary license to an operator or chauffeur, without preliminary hearing, upon a showing by its records or other sufficient evidence that the licensee's driving record is such as would authorize suspension as provided in subsection (a) hereof. Upon issuance of a probationary license the licensee shall be subject to the restrictions set forth thereon. The licensee's driving privilege may be suspended upon conviction, or forfeiture of bail, not vacated, of any traffic violation during the period of such probation. The licensee shall surrender to the board all driver licenses theretofore issued to him before such probationary license shall be issued. His refusal or neglect to surrender such licenses, upon demand, shall be ground for suspending all such licenses. Probationary licenses may be issued for a period not to exceed twelve (12) months.

(c) Upon suspending the license of any person or upon placing such person on probation, as hereinbefore in this section authorized, the board shall immediately notify the licensee in writing and upon his request shall afford him an opportunity for a hearing as early as practical within not to exceed twenty (20) days after receipt of such request in the county wherein the licensee resides unless the board and the licensee agree that such hearing may be held in some other county. Upon such hearing the supervisor or his duly authorized agent may administer oaths and may issue subpoenas for the attendance of witnesses and the production of relevant books and papers and may require a re-examination of the licensee. Upon

such hearing the board shall either rescind its order of suspension or probation, or, good cause appearing therefor, may affirm, reduce or extend the period of probation or suspension of such license.

History: En. Sec. 31, Ch. 267, L. 1947;
amd. Sec. 1, Ch. 101, L. 1961.

Collateral References

Necessity and sufficiency of notice and hearing before revocation of driver's license. 10 ALR 2d 833.

31-148. Board may require re-examination. The board having good cause to believe that a licensed operator or chauffeur is incompetent or otherwise not qualified to be licensed, may upon written notice of at least five (5) days to the licensee require him to submit to an examination. Upon the conclusion of such examination the board shall take action as may be appropriate and may suspend or revoke the license of such person or permit him to retain such license, or may issue a license subject to restrictions as permitted under section 31-137. Refusal or neglect of the licensee to submit to such examination shall be ground for suspension or revocation of his license.

History: En. Sec. 32, Ch. 267, L. 1947.

31-149. Period of suspension or revocation. (a) The board shall not suspend or revoke a driver's license or privilege to drive a motor vehicle on the public highways for a period of more than one (1) year, except as permitted under sections 31-148, 31-155, 53-424 and 53-430.

(b) Any person whose license or privilege to drive a motor vehicle on the public highways has been suspended or revoked shall not be entitled to have such license or privilege renewed or restored unless the revocation was for a cause which has been removed, except that after the expiration of the period of such revocation or suspension, such person may make application for a new license as provided by law, but the board shall not then issue a new license unless and until it is satisfied after investigation of character, habits, and driving ability of such person that it will be safe to grant the privilege of driving a motor vehicle on the public highways. Provided, however, when any person is convicted or forfeits bail or collateral not vacated for the offense of operating or being in actual physical control of a motor vehicle while under the influence of intoxicating liquor or narcotic drug or combination thereof, the board shall, upon receiving a report of such conviction or forfeiture of bail or collateral not vacated, suspend or revoke the license or driving privilege of such person for a period of (60) days. Upon receiving a report of a conviction or forfeiture of bail or collateral for a subsequent such offense, within five (5) years thereof, the board shall suspend or revoke the license or driving privilege of such person for a period of one (1) year.

History: En. Sec. 33, Ch. 267, L. 1947;
amd. Sec. 1, Ch. 126, L. 1957; amd. Sec.
1, Ch. 161, L. 1961.

31-150. Surrender and return of license. The board upon suspending or revoking a license shall require that such license shall be surrendered to

and be retained by the board except that at the end of the period of suspension such license so surrendered shall be returned to the licensee.

History: En. Sec. 34, Ch. 267, L. 1947.

31-151. No operation under foreign license during suspension or revocation in this state. Any resident or nonresident whose operator's or chauffeur's license or right or privilege to operate a motor vehicle in this state has been suspended or revoked as provided in this act shall not operate a motor vehicle in this state under a license, permit, or registration certificate issued by any other jurisdiction or otherwise during such suspension or after such revocation until a new license is obtained when and as permitted under this act.

History: En. Sec. 35, Ch. 267, L. 1947.

31-152. Right of appeal to court. Any person denied a license or whose license had been canceled, suspended, or revoked by the board except where such cancellation or revocation is mandatory under the provisions of this act shall have the right to file a petition within thirty (30) days thereafter for a hearing in the matter in the district court in the county wherein such person shall reside and such court is hereby vested with jurisdiction and it shall be its duty to set the matter for hearing upon thirty (30) days' written notice to the board, and thereupon to take testimony and examine into the facts of the case and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation, or revocation of license under the provisions of this act.

History: En. Sec. 36, Ch. 267, L. 1947.

Cross-Reference

Application of Montana Rules of Civil Procedure to this section, sec. 93-2711-7.

31-153. Unlawful use of license. It is a misdemeanor for any person:

1. To display or cause or permit to be displayed or have in his possession any canceled, revoked, suspended, fictitious, or altered operator's or chauffeur's license;

2. To lend his operator's or chauffeur's license to any other person or knowingly permit the use thereof by another;

3. To display or represent as one's own any operator's or chauffeur's license not issued to him;

4. To fail or refuse to surrender to the board upon its lawful demand any operator's or chauffeur's license which has been suspended, revoked or canceled;

5. To use a false or fictitious name in any application for an operator's or chauffeur's license or to knowingly make a false statement or to knowingly conceal a material fact or otherwise commit a fraud in any such application;

6. To permit any unlawful use of an operator's or chauffeur's license issued to him; or

7. To do any act forbidden or fail to perform any act required by this act.

History: En. Sec. 37, Ch. 267, L. 1947;
amd. Sec. 1, Ch. 70, L. 1961.

31-154. Making false affidavit perjury. Any person who makes any false affidavit, or knowingly swears or affirms falsely to any matter or thing required by the terms of this act to be sworn to or affirmed, is guilty of perjury and upon conviction shall be punishable by fine or imprisonment as other persons committing perjury are punishable.

History: En. Sec. 38, Ch. 267, L. 1947.

31-155. Driving while license suspended or revoked. (a) Any person who drives a motor vehicle on any public highway of this state at a time when his privilege so to do is suspended or revoked shall be guilty of a misdemeanor and upon conviction shall be punished by imprisonment for not less than two (2) days or more than six (6) months and there may be imposed in addition thereto a fine of not more than five hundred dollars (\$500.00).

(b) The board upon receiving a record of the conviction of any person under this section upon a charge of driving a vehicle while the license of such person was suspended or revoked shall extend the period of such suspension or revocation for an additional like period.

History: En. Sec. 39, Ch. 267, L. 1947;
amd. Sec. 1, Ch. 84, L. 1959.

31-156. Permitting unauthorized minor to drive. No person shall cause or knowingly permit his child or ward under the age of eighteen (18) years to drive a motor vehicle upon any highway when such minor is not authorized hereunder or in violation of any of the provisions of this act.

History: En. Sec. 40, Ch. 267, L. 1947.

Collateral References

Construction, application, and effect of

legislation making it offense to permit unauthorized person to operate motor vehicle. 69 ALR 2d 978.

31-157. Employing unlicensed chauffeur. No person shall employ as a chauffeur of a motor vehicle any person not then licensed as provided by this act.

History: En. Sec. 41, Ch. 267, L. 1947.

31-158. Renting motor vehicle to another. (a) No person shall rent a motor vehicle to any other person unless the latter person is then duly licensed hereunder or, in the case of a nonresident, then duly licensed under the laws of the state or country of his residence except a nonresident whose home state or country does not require that an operator be licensed.

(b) No person shall rent a motor vehicle to another until he has inspected the operator's or chauffeur's license of the person to whom the vehicle is to be rented and compared and verified the signature thereon with the signature of such person written in his presence.

(c) Every person renting a motor vehicle to another shall keep a record of the registration number of the motor vehicle so rented, the name and address of the person to whom the vehicle is rented, the number of the license of said latter person and the date and place when and where

said license was issued. Such record shall be open to inspection by any police officer or officer or employee of the board.

History: En. Sec. 42, Ch. 267, L. 1947.

legislation making it offense to permit unauthorized person to operate motor vehicle. 69 ALR 2d 978.

Collateral References

Construction, application, and effect of

31-159. Penalty for misdemeanor. (a) It is a misdemeanor for any person to violate any of the provisions of this act unless such violation is by this act or other law of this state declared to be a felony.

(b) Unless another penalty is in this act or by the laws of this state provided, every person convicted of a misdemeanor for the violation of any provision of this act shall be punished by a fine of not more than five hundred dollars (\$500.00) or by imprisonment for not more than six (6) months, or by both such fine and imprisonment.

History: En. Sec. 43, Ch. 267, L. 1947.

31-160. Uniformity of interpretation. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History: En. Sec. 44, Ch. 267, L. 1947.

31-161. Short title. This act may be cited as the Uniform Motor Vehicle Operators' and Chauffeurs' License Act.

History: En. Sec. 45, Ch. 267, L. 1947.

31-162. Constitutionality. If any part or parts of this act shall be held to be unconstitutional such unconstitutionality shall not affect the validity of the remaining parts of this act. The legislature hereby declares that it would have passed the remaining parts of this act if it had known that such part or parts thereof would be declared unconstitutional.

History: En. Sec. 46, Ch. 267, L. 1947.

CHAPTER 2

HIGHWAY PATROLMEN'S RETIREMENT SYSTEM

- Section 31-201. Definitions.
- 31-202. Montana highway patrolmen's retirement system.
- 31-203. Montana highway patrolmen's retirement board.
- 31-204. Administrative expenses.
- 31-205. Payments into the Montana highway patrolmen's retirement fund—investment.
- 31-206. Rules and regulations—actuarial data.
- 31-207. Membership.
- 31-208. Service allowance.
- 31-209. Payments by contributors.
- 31-210. Contributions by the state of Montana.
- 31-211. Retirement.
- 31-212. Voluntary retirement.
- 31-213. Retirement allowance.
- 31-214. Disability retirement allowance.
- 31-215. Involuntary retirement allowance.
- 31-216. Compulsory retirement allowance.
- 31-217. Refunds in case of resignation or discharge.
- 31-218. Payments upon death.

- 31-219. Payments in case of death from natural causes.
- 31-220. Monthly payments of retirement allowances.
- 31-221. Exemption from taxes and execution.
- 31-222. Nomination of beneficiary.
- 31-223. Service in the armed forces of the United States.
- 31-224. Fraud—correction of errors.
- 31-225. Restrictions upon payments.
- 31-226. Subrogation.
- 31-227. Payments under other laws.
- 31-228. Optional retirement allowance.
- 31-229. Separability of provisions.
- 31-230. Dormant savings accounts—transfer—subsequent re-entry to membership.

31-201. Definitions. The following words and phrases as used in this act, unless a different meaning is plainly implied by the context, shall have the following meanings:

“Accumulated deductions,” the total of the amounts deducted from the salary of a contributor and paid into the fund, and standing to his credit in the fund, together with the regular interest thereon.

“Beneficiary,” shall be such person or persons having an insurable interest in his life as he shall nominate by written designation, duly acknowledged and filed with the board.

“Retired patrolman,” any person in receipt of a retirement allowance under this act.

“Board,” the Montana highway patrolmen’s retirement board.

“Compulsory retirement age,” sixty years of age.

“Contributor,” any person who has accumulated deductions in the fund, standing to his credit.

“Final salary,” the average annual compensation received by a contributor before any deductions have been made, and exclusive of maintenance, allowances and expenses, for any three (3) years of continuous service upon which contributions have been made, or, in the event a member has not served three (3) years, the total retirement compensation earned, divided by the number of years served.

“Actuarial equivalent,” the accumulated contributions and the present value of the member’s state service based on length of service and member’s attained age used to provide a life or temporary life income to the legally designated person, based on such person’s attained age and sex at the time the option becomes available.

“Fund,” the Montana highway patrolmen’s retirement fund.

“Involuntary retirement,” a retirement not for cause and before retirement age.

“Member’s annuity,” payments for life derived from contributions made by the contributor.

“Optional retirement age,” the age at which a contributor may retire after twenty (20) years’ service or more.

“Retirement age,” the age at which a member retires after twenty-five (25) years of creditable service with the Montana highway patrol.

“Retirement allowance,” the state annuity plus the member’s annuity.

"State annuity," payments for life derived from contributions made by the state of Montana.

History: En. Sec. 1, Ch. 37, L. 1945;
amd. Sec. 1, Ch. 243, L. 1955.

Collateral References

Validity of repeal or modification of
pension statute provisions. 52 ALR 2d
437.

31-202. Montana highway patrolmen's retirement system. A retirement system is hereby established for the members of the Montana highway patrol.

History: En. Sec. 2, Ch. 37, L. 1945.

31-203. Montana highway patrolmen's retirement board. There is hereby established the Montana highway patrolmen's retirement board, which shall consist of five (5) members, who shall be the chairman of the Montana highway patrol board, the supervisor of the Montana highway patrol, and three (3) members of the Montana highway patrolmen's association. Immediately after the passage and approval of this act, the Montana highway patrolmen's association shall elect one (1) member whose term of office shall expire July 1, 1956, another member whose term of office shall expire on July 1, 1957, and another member whose term of office shall expire on July 1, 1958, and their successors shall be elected for a term of three (3) years, except that any person appointed to fill a vacancy shall be eligible for election. The secretary and attorney of the Montana highway patrol board shall be members ex officio.

History: En. Sec. 3, Ch. 37, L. 1945;
amd. Sec. 2, Ch. 243, L. 1955.

31-204. Administrative expenses. The expense of the administration of this act, exclusive of the payment of retirement allowances and other benefits, shall be paid by the state of Montana, by appropriation out of the general fund, made on the basis of budgets submitted by the board.

History: En. Sec. 4, Ch. 37, L. 1945.

31-205. Payments into the Montana highway patrolmen's retirement fund—investment. All appropriations made by the state of Montana, all contributions by members of the Montana highway patrol, in the amount hereinafter specified, and all interest on and increase of the investments and moneys under this account shall be paid to the state treasurer, who shall credit said payments to the Montana highway patrolmen's retirement fund. Whenever there is on deposit in the Montana highway patrolmen's retirement fund a sum in excess of twenty-five thousand dollars (\$25,000.00), such excess will be invested by the state board of land commissioners as part of the long term investment fund and any of the fund less than twenty-five thousand dollars (\$25,000.00) in amount shall be invested by the state board of land commissioners as part of the short term investment fund when so directed by the Montana highway patrolmen's retirement board.

History: En. Sec. 5, Ch. 37, L. 1945;
amd. Sec. 1, Ch. 158, L. 1949; amd. Sec.
1, Ch. 176, L. 1953.

31-206. Rules and regulations—actuarial data. The board may establish such rules and regulations as it deems necessary, and is charged within the limitations of this act for its proper administration, operation, and enforcement, and shall be the authority under this act as to the conditions under which persons may be admitted to and continue to receive benefits under the retirement system. It shall keep such data as shall be necessary for actuarial valuation purposes. It shall cause to be made periodic actuarial investigations into the mortality and service experience of the contributors to and the beneficiaries of the fund, and shall adopt for the retirement system one or more mortality tables.

History: En. Sec. 6, Ch. 37, L. 1945;
amd. Sec. 3, Ch. 243, L. 1955.

31-207. Membership. Every member of the Montana highway patrol, including the supervisor and assistant supervisors, but excepting the present supervisor, shall be required to become a member of the retirement system established by this act on July 1, 1945, and thereafter when first becoming a member of the Montana highway patrol. Contributions by members under this act shall commence with the first payroll after July 1, 1945. If any person who becomes a member of the Montana highway patrol subsequent to July 1, 1945, shall have been at any time theretofore a member of the Montana highway patrol, he shall receive credit for any such service prior to July 1, 1945, upon complying with the provisions of this act.

History: En. Sec. 7, Ch. 37, L. 1945.

31-208. Service allowance. In computing the length of service of a contributor for retirement purposes, full credit shall be given to each contributor for each year of service rendered to the patrol including service rendered prior to July 1, 1945, upon complying with the provisions of this act. As soon as practicable, the retirement board shall issue to each original member a certificate certifying the aggregate length of his service prior to July 1, 1945. Such certificate shall be final and conclusive as to his prior service unless thereafter modified by the board upon application of the contributor. The time during which a contributor is absent from service without pay shall not be counted in computing the service of a contributor except service with the armed forces of the United States in time of war.

History: En. Sec. 8, Ch. 37, L. 1945;
amd. Sec. 4, Ch. 243, L. 1955.

ployee as affecting computation of length of service for retirement or pension purposes. 6 ALR 2d 506.

Collateral References

Disciplinary suspension of public em-

31-209. Payments by contributors. Every member shall be required to contribute into the fund a sum equal to five per cent (5%) of his monthly salary, which sum shall be deducted from his salary and credited to his account in the fund, provided that when a member has served twenty-five (25) years in the Montana highway patrol all payments by him and contributions to his credit from the fund shall cease.

History: En. Sec. 9, Ch. 37, L. 1945;
amd. Sec. 5, Ch. 243, L. 1955.

Collateral References

What constitutes "salary," "wages," "pay," or the like, within pension law basing benefits thereon. 14 ALR 2d 634.

31-210. Contributions by the state of Montana. The state of Montana shall annually contribute to the fund fifteen per cent (15%) of all moneys received by the state of Montana from the collection of the motor vehicle driver's license fee provided for under the laws of the state of Montana.

History: En. Sec. 10, Ch. 37, L. 1945;
amd. Sec. 6, Ch. 243, L. 1955.

31-211. Retirement. Any member in service who has completed at least twenty-five (25) years of creditable service may retire on a service retirement allowance upon written application to the board setting forth at what time, not less than thirty (30) days nor more than ninety (90) days subsequent to the filing thereof, he desires to be retired.

History: En. Sec. 11, Ch. 37, L. 1945.

31-212. Voluntary retirement. If a contributor has served twenty (20) years of creditable service with the Montana highway patrol, he is hereby granted the option and privilege of retiring and in such case, his retirement allowance shall be proportionately reduced.

History: En. Sec. 12, Ch. 37, L. 1945;
amd. Sec. 7, Ch. 243, L. 1955.

31-213. Retirement allowance. Upon retirement from service a member shall receive a service retirement allowance which shall consist of the state annuity plus the member's annuity. The member's annuity shall be the actuarial equivalent of his aggregate contributions at the time of retirement and the state annuity shall be in an amount which, when added to the member's annuity, will provide a total retirement allowance of one-half ($\frac{1}{2}$) of his average final salary.

History: En. Sec. 13, Ch. 37, L. 1945.

31-214. Disability retirement allowance. In case of the total disability of a contributor, permanent in character, regardless of the length of service of the contributor, a disability retirement allowance shall be granted the contributor in an amount calculated on the actuarial equivalent of the member's annuity and the state annuity standing to his credit at the time of his disability retirement; provided that if such total disability is a direct result of any service to the Montana highway patrol in line of duty, then such patrolman who is totally and permanently disabled shall be retired on total retirement allowance of one-half his average final salary regardless of his length of service.

History: En. Sec. 14, Ch. 37, L. 1945; performance of official duties and his disability, for purpose of recovering disability benefits. 27 ALR 2d 974.
amd. Sec. 1, Ch. 109, L. 1947.

Collateral References

Causal connection between policeman's

31-215. Involuntary retirement allowance. Should a contributor be discontinued from service, not voluntarily, after having completed ten (10) years of total service, but before reaching retirement age, he shall, upon filing of application in the manner herein provided for retirement, be paid as he may elect as follows: (a) the full amount of accumulated deductions standing to his credit; or (b) a member's annuity of equivalent

actuarial value to his accumulated deductions standing to his credit, plus the actuarial equivalent of a state annuity having a value equal to the present value of a state annuity then standing to his credit.

History: En. Sec. 15, Ch. 37, L. 1945;
amd. Sec. 8, Ch. 243, L. 1955.

31-216. Compulsory retirement allowance. Any member, regardless of his years of service, who has attained the age of sixty (60) years, shall forthwith be retired. If he shall have served twenty-five (25) years or more, he shall receive the full retirement allowance as provided herein. If he shall have served less than twenty-five (25) years, he shall be entitled to the same options as provided in section 31-215.

History: En. Sec. 16, Ch. 37, L. 1945;
amd. Sec. 9, Ch. 243, L. 1955.

31-217. Refunds in case of resignation or discharge. Where a contributor resigns of his own volition, or is discharged for cause before becoming entitled to a retirement allowance, then the deductions standing to his credit shall be paid to him.

History: En. Sec. 17, Ch. 37, L. 1945;
amd. Sec. 2, Ch. 109, L. 1947; amd. Sec.
10, Ch. 243, L. 1955.

Collateral References

Misconduct as affecting right to pension
or retention in retirement system. 76 ALR
2d 566.

31-218. Payments upon death. If the board shall find that a contributor died as a direct and proximate result of injury received in the course of his employment, a retirement allowance shall be paid to his beneficiary.

Such retirement allowance shall consist of: (a) a member's annuity which shall be the actuarial equivalent of the contributor's accumulated deductions standing to his credit; and (b) the actuarial equivalent of a state annuity which when added to the member's annuity will provide a total annuity equal to fifty per cent (50%) of the final salary of the contributor, less the amount which is paid to any such beneficiary under the Workmen's Compensation Act of the state of Montana, during the period such compensation is paid or payable.

History: En. Sec. 18, Ch. 37, L. 1945;
amd. Sec. 11, Ch. 243, L. 1955.

formance of official duties and his death,
for purpose of recovery of benefits by
survivors. 27 ALR 2d 1004.

Collateral References

Relationship between policeman's per-

31-219. Payments in case of death from natural causes. (a) If the retired patrolman dies before receiving in payments the present value of his member's annuity and the state annuity as it was at the time of his retirement, the balance shall be paid to his beneficiary. (b) If a member dies before reaching retirement age, his beneficiary shall be entitled to the actuarial equivalent of the options as provided in section 31-215.

History: En. Sec. 19, Ch. 37, L. 1945;
amd. Sec. 12, Ch. 243, L. 1955.

31-220. Monthly payments of retirement allowances. The retirement allowances granted under the provisions of this act shall be paid in equal

monthly installments and shall not be increased, decreased, revoked or repealed unless by act of the legislative assembly of the state of Montana.

History: En. Sec. 20, Ch. 37, L. 1945.

31-221. Exemption from taxes and execution. Any money received or to be paid as a member's annuity, state annuity or return of deductions or the right of any of these, shall be exempt from any state or municipal tax and from levy, sale, garnishment, attachment or any other process whatsoever and shall be unassignable.

History: En. Sec. 21, Ch. 37, L. 1945.

31-222. Nomination of beneficiary. Every contributor shall have the authority to name his beneficiary by written designation duly acknowledged and filed with the board, and to change the beneficiary in like manner. Such designation and all changes must be filed with the board up until, but not after, the time of retirement.

History: En. Sec. 22, Ch. 37, L. 1945.

31-223. Service in the armed forces of the United States. Any member of the Montana highway patrol now in or hereafter inducted into the armed forces of the United States, shall have the option: (a) to continue his payments into the fund; or (b) allow the board to make his payments for him during such military service, in which event he shall repay the fund the full amount of such payments upon his return to the Montana highway patrol, and such repayments must be made within two (2) years after his return to the patrol provided that a member's service in the armed forces of the United States shall be credited to and made a part of the member's service allowance.

History: En. Sec. 23, Ch. 37, L. 1945;
amd. Sec. 13, Ch. 243, L. 1955.

31-224. Fraud—correction of errors. (a) No person shall knowingly make any false statement, or shall falsify or permit to be falsified any record or records of the retirement system herein established in any attempt to defraud such system. (b) Should any such change in records fraudulently made or any mistake in records inadvertently made result in any contributor or beneficiary receiving more or less than he would have been entitled to had the records been correct, then, on the discovery of such error, the board shall correct such error and shall adjust the payments which shall be made to the contributor or annuitant in such manner that the actuarial equivalent of the benefit to which he was correctly entitled shall be paid.

Any person violating any of the provisions of subsection (a) of this section shall be guilty of a misdemeanor, and, upon conviction, shall be sentenced to pay a fine not exceeding one thousand (\$1,000.00) dollars or suffer imprisonment not exceeding one (1) year, or both, in the discretion of the court.

History: En. Sec. 24, Ch. 37, L. 1945.

31-225. Restrictions upon payments. If any beneficiary is convicted of a felony, the board shall have the authority to revoke or suspend, for as

long a time as it sees fit, disbursement of the state annuity. Where the illness or injuries causing a contributor to be retired, or where the death of a contributor is directly and proximately caused by such contributor's immoral or intemperate conduct or gross negligence, the board shall have the authority to refuse, revoke, or suspend for as long a time as it sees fit disbursement of the state annuity.

History: En. Sec. 25, Ch. 37, L. 1945.

31-226. Subrogation. Where a third person is liable to the member or his dependents for injury or death, the state shall be subrogated to the right of the member or the dependents against such third person; but only to the extent of the state annuity payable under this act by the state. Any recovery against such third person, in excess of the state annuity theretofore paid or thereafter to be paid by the state shall be paid forthwith to the contributor or the person designated by the contributor.

History: En. Sec. 26, Ch. 37, L. 1945.

31-227. Payments under other laws. All payments provided for in this act are in addition to any other benefits now or hereafter provided for under the Workmen's Compensation Act of the state of Montana.

History: En. Sec. 27, Ch. 37, L. 1945.

31-228. Optional retirement allowance. Until the first payment on account of any retirement allowance is made and subject to the conditions that, if he die after retirement and within thirty (30) days from the date upon which his election or changed election is received at the office of the retirement board, then said election is void and of no effect, and the death shall be considered as that of a member before retirement. A member or a beneficiary may elect, or revoke or change a previous election prior to the approval of the previous election to receive the actuarial equivalent of his retirement allowance as of the date of retirement, in a lesser retirement allowance, payable throughout life with one of the following options:

Option 1. Upon his death, his lesser retirement allowance shall be continued throughout the life of and paid to such person, having an insurable interest in his life, as he nominates by written designation duly executed and filed with the board at the time of his retirement.

Option 2. Upon his death, one-half of his lesser retirement allowance shall be continued throughout the life of and paid to such person, having an insurable interest in his life, as he nominates by written designation duly executed and filed with the board at the time of his retirement.

Option 3. Such other benefit or benefits shall be paid, either to the beneficiary or to such other person or persons as he nominates, as, together with such lesser retirement allowance, are the actuarial equivalent of his retirement allowance, and shall be approved by the board.

History: En. 31-228 by Sec. 14, Ch. 243, L. 1955.

31-229. Separability of provisions. The provisions of this act are severable, and, if any of its provisions shall be held to be unconstitutional, the decision of the court shall not affect or impair any of the remaining provi-

sions. It is hereby declared to [be] the legislative intent that this act would have been adopted had such unconstitutional provisions not been included herein.

History: En. 31-229 by Sec. 14, Ch. 243,
L. 1955.

Compiler's Note

The bracketed word "be" was inserted
by the compiler.

31-230. Dormant savings accounts—transfer—subsequent re-entry to membership. The board may in its discretion transfer the savings account of a member to the pension accumulation fund if the account has been dormant for a period of ten (10) years; provided that no right of the member shall be jeopardized by such transfer and the savings account shall be transferred to the member's name upon subsequent re-entry to membership.

History: En. 31-230 by Sec. 14, Ch. 243,
L. 1955.

TITLE 32

HIGHWAYS, BRIDGES AND FERRIES

- Chapter 1. Highways—definitions and classifications, 32-101 to 32-107.
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19. Montana toll bridge authority, 32-1901 to 32-1915.
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CHAPTER 1

HIGHWAYS—DEFINITIONS AND CLASSIFICATIONS

- Section 32-101. Name or title of act.
32-102. Highways deemed to include what.
32-103. Public highways defined.
32-104. Classification—common and main highways.
32-105. Abandonment or vacation of highways.
32-106. Width of way or road.
32-107. Rights acquired by public in highway.

32-101. (1610) Name or title of act. This act shall be known as the “General Highway Law.”

History: En. Sec. 1, Ch. 72, L. 1913; re-en. Sec. 1, Ch. 141, L. 1915; re-en. Sec. 1, Ch. 172, L. 1917; re-en. Sec. 1610, R. C. M. 1921.

NOTE.—For earlier acts see chapter 44, Laws of 1903, and sections 1337-1456, Revised Codes of 1907.

Collateral References

Highways—19.
39 C.J.S. Highways § 37.

32-102. (1611) Highways deemed to include what. Within the meaning of this act, a highway shall be deemed to include its necessary embankments, retaining walls, culverts, sluices, and drains, and a bridge shall be deemed to include its superstructures, abutments, and piers and approaches, except dirt fills.

History: En. Sec. 2, Ch. 72, L. 1913; Ch. 172, L. 1917; re-en. Sec. 1611, R. C. M. amd. Sec. 2, Ch. 141, L. 1915; re-en. Sec. 2, 1921.

Collateral References

Highways \Rightarrow 18.
39 C.J.S. Highways § 1.

32-103. (1612) Public highways defined. As used in this act, "public roads and highways of this state" shall mean all streets, roads, highways, and related structures as have been, or shall be, built and maintained with appropriated funds of the United States and which have been, or shall be, built and maintained with funds of the state of Montana, or any political subdivision thereof, or which have been or shall be dedicated to public use or have been acquired by eminent domain.

History: En. Sec. 2600, Pol. C. 1895; amd. Sec. 1, Ch. 44, L. 1903; re-en. Sec. 1337, Rev. C. 1907; amd. Sec. 3, Ch. 72, L. 1913; re-en. Sec. 3, Ch. 141, L. 1915; re-en. Sec. 3, Ch. 172, L. 1917; re-en. Sec. 1612, R. C. M. 1921; amd. Sec. 1, Ch. 247, L. 1959. Cal. Pol. C. Sec. 2618.

NOTE.—For history of this and following sections see *Barnard Realty Co. v. City of Butte*, 48 M 102, 111, 136 P 1064.

Bridges

In view of the statute upon the subject, a bridge is a part and parcel of the highway upon which it is built. *State ex rel. Foster v. Ritch*, 49 M 155, 157, 140 P 731; *State ex rel. Donlan v. Board of Commrs.*, 49 M 517, 523, 143 P 984; *State ex rel. Furnish v. Mullendore*, 53 M 109, 113, 161 P 949, 953.

Where one voluntarily erects a bridge intending that it should become a part of an existing public highway and belong to the public as such, or does so under an arrangement by which he might be compensated for the labor and materials furnished in constructing it, he may not claim to be the owner, or attempt to restrain the public in the free use thereof. *State ex rel. Donlan v. Board of Commrs.*, 49 M 517, 523, 143 P 984.

County Property

It was not the intention of the legislature that all public highways, including roads, streets, alleys, courts, culverts, and bridges composing the same, should be appraised as county property, and the value thus set upon them considered in the adjustment of the property rights and liabilities of counties out of which a new one has been created. *State ex rel. Foster v. Ritch*, 49 M 155, 157, 140 P 731.

Dedication or Abandonment

Dedication or abandonment is not shown by mere user until the period of limitation of actions to recover real property has elapsed. *Montana Ore Purchasing Co. v. Boston & B. Consol. Min. Co.*, 25 M 427, 431, 65 P 420.

Generally, no one except the owner of

an unlimited estate or an estate in fee simple can make a dedication of land, but the owner of an equitable estate may make a dedication which will be effective and, while a mortgagor may divest his rights in property dedicated, he cannot affect the rights of the mortgagee. *Descheemaeker v. Anderson*, 131 M 322, 310 P 2d 587, 591, 63 ALR 2d 1153.

Proof of facts to constitute a dedication must be clear, satisfactory and unequivocal. *Descheemaeker v. Anderson*, 131 M 322, 310 P 2d 587, 591, 63 ALR 2d 1153.

Indian Lands

Regulations of the department of the interior concerning rights of way over Indian lands must be judicially noticed by the courts, and under Sec. 2, Ch. 161, 38 Stat. 1189, road authorities are not required to secure the consent or approval of the secretary of the interior before proceeding to the establishment thereof, the consent of the superintendent of the particular agency being sufficient. *Peasley v. Trosper*, 103 M 401, 406, 63 P 2d 131.

Under act of Congress (38 Stat. 1189), a road across Indian lands in this state is deemed a public road when it is opened and laid out by the legal authorities charged with the duty of laying out and opening public roads under state laws and having jurisdiction of the territory embraced within the Indian reservation. *Peasley v. Trosper*, 103 M 401, 407, 63 P 2d 131.

Municipal Jurisdiction

The streets of a city are public highways, and though the city is charged with the duty of keeping them in repair and the cost of maintenance is imposed upon the city, nevertheless jurisdiction over them is primarily in the state, and the city acts with respect to them subject to the general laws of the state. *City of Helena v. Helena Light & Railway Co.*, 63 M 108, 120, 207 P 337.

Collateral References

Width and boundaries of public highway acquired by prescription or adverse user. 76 ALR 2d 535.

DECISIONS UNDER FORMER LAW

Definitions

Under this section (prior to the 1959 amendment), a road became a county road when "laid out," whether "erected" or not; to "lay out" a road means locating and establishing a new highway—the taking of all necessary legal steps for the establishment of, and looking toward its construction—but does not include the actual physical act of construction; when so laid out, it does not become extinct through not being opened or used by the public. *French v. County of Lewis and Clark*, 87 M 448, 454, 288 P 455.

Under this section (prior to the 1959 amendment) public highways are such as have been established by the public authorities or were recognized by them and used generally by the public, or which had become such by prescription or adverse use at the time of the enactment of the statute. *Peasley v. Trosper*, 103 M 401, 405, 63 P 2d 131.

Evidence of License

The fact that a passage over a road has been for years barred by gates or other obstructions to be opened and closed by the parties passing thereover is strong evidence, in an action in which a public road by prescription is claimed, of a mere license to the public to pass over the way. *Peasley v. Trosper*, 103 M 401, 406, 63 P 2d 131.

Evidence of Use

The keeping of a record by the county commissioners of a certain county road, together with other facts showing its use by the public, was prima facie evidence showing that it was a public road within the meaning of the above section. *Smith v. Zimmer*, 45 M 282, 293, 125 P 420.

In order to establish a public highway by prescription by proof of travel over it for the statutory period, the testimony must definitely show a use of the identical strip of lands over which the right is claimed, coupled with an assumption of control, and not merely by the owner's permission. *Peasley v. Trosper*, 103 M 401, 63 P 2d 131.

Before a road may be established by prescription over the lands of another, the evidence must be clear and convincing that the use of the road by the public was adverse and not merely permitted by the landowner. *Descheemaeker v. Anderson*, 131 M 322, 310 P 2d 587, 589, 63 ALR 2d 1153.

Prescription

This section, as it appeared in the Political Code of 1895, was a remedial statute, curing irregularities, but not supplying

jurisdiction, where none was acquired, in the creation of roads, and recognized the existence of highways by prescription when they had been used or traveled by the people generally for the period named in the statute of limitations. *State v. Auchard*, 22 M 14, 16, 55 P 361; *Montana Ore Purchasing Co. v. Boston & B. Consol. Min. Co.*, 25 M 427, 431, 65 P 420.

Those roads only are declared to be public highways which had been established by the public authorities, or were recognized by them and used generally by the public, or which had become such by prescription or adverse use, at the time of the enactment of this section as section 2600 of the Political Code of 1895. *Barnard Realty Co. v. City of Butte*, 48 M 102, 109, 136 P 1064.

Where it is sought to establish a public road over the lands of another by prescription, the evidence must be convincing that the public have pursued a definite, fixed course, continuously and uninterruptedly, coupled with an assumption of control and right of use adversely under claim or color of right for the statutory period. *Moulton et al. v. Irish et al.*, 67 M 504, 507 et seq., 218 P 1053.

A road may not be held to have been established by prescription where it is made to appear that it was never traveled by the general public. *Warren v. Chouteau County*, 82 M 115, 122, 265 P 676.

Public Domain Lands

The grant authorized by section 2477, Revised Codes of the United States, is nothing more than an offer of a right of way for the construction of a public highway across the public domain, and can become fixed only when the highway is established and constructed in the manner authorized by the laws of the state in which the land is situated, and where that offer is accepted by user, that user must be shown to have continued over the exact route claimed for the statutory period prior to July 1st, 1895. *State ex rel. Dansie v. Nolan*, 58 M 167, 172, 191 P 150.

Under section 2477, United States Revised Statutes, a grant of a right of way for highway purposes over public domain does not become operative until accepted by the public by the construction of a highway according to the provisions of state law. *Warren v. Chouteau County*, 82 M 115, 122, 265 P 676.

References

Cited or applied as section 2600, Political Code in *State ex rel. Rocky Mt. Bell Tel. Co. v. Red Lodge*, 30 M 338, 340, 76 P 758; as Sec. 3, Ch. 72, Laws 1913, in

State ex rel. *Furnish v. Mullendore*, 53 M 109, 113, 161 P 949, 953; State ex rel. *McMaster v. District Court*, 80 M 228, 231, 260 P 134; *Norton v. Great Northern Ry. Co. et al.*, 87 M 270, 290, 278 P 521; State

ex rel. *State Highway Commission v. District Court et al.*, 105 M 44, 52, 69 P 2d 112; State ex rel. *Great Falls Housing Authority v. City of Great Falls*, 110 M 318, 328, 100 P 2d 915.

32-104. (1613) Classification—common and main highways. Public highways in this state shall hereafter be classed as common highways, main highways, and state highways. All highways which are not established or improved in the manner hereinafter provided for state highways, shall be common or public highways. Common or public highways shall be such as are established or improved in the manner provided by chapter 4 of this title.

History: En. Sec. 4, Ch. 72, L. 1913; re-en. Sec. 4, Ch. 141, L. 1915; re-en. Sec. 4, Ch. 172, L. 1917; re-en. Sec. 1613, R. C. M. 1921.

References

State ex rel. *McMaster v. District Court*, 80 M 228, 231, 260 P 134; *Park County v. Miller*, 117 M 157, 159, 159 P 2d 358.

32-105. (1614) Abandonment or vacation of highways. All public highways once established must continue to be public highways until abandoned by operation of law, or by judgment of a court of competent jurisdiction, or by the order of the board of county commissioners of the county in which they are situated; but no order to abandon any highway shall be valid unless preceded by due notice and hearing as provided in this act; and no state highway can be abandoned except on the joint order of the board of county commissioners and the state highway commission.

History: En. Sec. 5, Ch. 72, L. 1913; re-en. Sec. 5, Ch. 141, L. 1915; re-en. Sec. 5, Ch. 172, L. 1917; re-en. Sec. 1614, R. C. M. 1921. Cal. Pol. C. Sec. 2619.

NOTE.—For earlier acts see section 2601, Political Code, 1895; re-enacted as section 2, chapter 44, Laws of 1903; re-enacted as section 1338, Revised Codes of 1907.

Conditional Grant

A public road established at public expense in strict conformity with statutory provisions and with the consent of the owner, who relinquished compensation as to such part of the road as ran through his land, remained such until abandoned as provided in the above section, notwithstanding the failure of the county commissioners to comply with the conditions attached to owner's consent. *Flynn v. Beaverhead County*, 49 M 347, 352, 141 P 673.

Order of Vacation Required

A highway, whether a county road or a street, once established, cannot be vacated, except by an order of the public authorities having jurisdiction over it. *Barnard Realty Co. v. City of Butte*, 48 M 102, 114, 136 P 1064.

Prescriptive Title

The mere use of land by the public as a street for the statutory period, not coupled with an assumption of jurisdiction over it by the city authorities, is insufficient to clothe the city with title by prescription. *Barnard Realty Co. v. City of Butte*, 48 M 102, 113, 136 P 1064; *Barnard Realty Co. v. City of Butte*, 55 M 384, 390, 177 P 402.

Travel by one or more persons over a given route, outside of an incorporated city or town, is not of itself, in the absence of an assumption of jurisdiction by the board of county commissioners, by some definite action, sufficient to constitute adverse use of it as a highway. *Barnard Realty Co. v. City of Butte*, 48 M 102, 114, 136 P 1064.

Quiet Title Remedy

The remedy established by law for vacating or abandoning a road lies only where the road has been lawfully established; therefore a landowner who seeks to have his title to land over which a road has been illegally extended, quieted in him may not be denied relief on the alleged ground that his remedy lies in an action to vacate under the above section. *Warren v. Chouteau County*, 82 M 115, 121, 265 P 676.

Collateral References

Highways—75(1), 79(1).
39 C. J. S. Highways §§ 116, 130.

Effect, with respect to owner's rights, of regulations as to subdivision maps or

plats upon vacation of streets and highways. 11 ALR 2d 587.

Closing street to facilitate traffic as unlawful interference with access of abutter. 73 ALR 2d 701.

32-106. (1615) Width of way or road. The width of all public highways, except bridges, alleys, lanes, must be sixty feet unless a greater or less width is ordered by the board of county commissioners on petition of the person interested. The width of all private highways and byroads, except bridges, must be at least twenty feet. Nothing in this act must be construed as to increase or diminish the width of either kind of a highway already established or used as such.

History: Ap. p. Sec. 10, p. 106, L. 1874; re-en. Sec. 1061, 5th Div. Rev. Stat. 1879; re-en. Sec. 1822, 5th Div. Comp. Stat. 1887; amd. Sec. 2602, Pol. C. 1895; amd. Sec. 3, Ch. 44, L. 1903; re-en. Sec. 1339, Rev. C. 1907; re-en. Sec. 6, Ch. 72, L. 1913; re-en. Sec. 6, Ch. 141, L. 1915; re-en. Sec. 6, Ch. 172, L. 1917; re-en. Sec. 1615, R. C. M. 1921. Cal. Pol. C. Sec. 2620.

Omission of Width from Establishment Proceedings

It is no objection to the proceedings to open a road that the width of such proposed road was not designated either in the report of the viewers or the order opening the road, since the width of highways within the state being regulated by statute, such width prevails where the proceedings are silent upon that point. *Crowley v. Board of Commissioners*, 14 M 292, 297, 36 P 313.

Ungraded Portion of Road

When a sufficient portion of a public highway is graded or otherwise prepared for travel, the invitation to the public to use the highway is confined to the prepared or used portion, and the duty then devolves upon the traveler to keep within that portion prepared for its use, and for injuries received outside of that portion he cannot recover, unless he can

excuse his presence at the place where he was injured. *Howard v. Flathead Independent Tel. Co.*, 49 M 197, 202, 141 P 153.

Width To Be Maintained

While theoretically a public highway in this state is sixty feet in width, the county is not required to grade or keep it, for its entire width, in condition for public travel; but its duty is fully discharged if the portion graded or made ready for travel is of sufficient width to accommodate the use which may be fairly anticipated to be made of it, and the authorities in control may use the remaining portions for purposes inconsistent with their use as driveways, as, for instance, for piling stones, cutting down and leaving steep embankments, or for drainage ditches. *Howard v. Flathead Independent Tel. Co.*, 49 M 197, 202, 141 P 153.

References

City of Butte v. Mikowitz, 39 M 350, 357, 102 P 593; *State v. Board of County Commissioners*, 83 M 540, 554, 273 P 290; *Norton v. Great Northern Ry. Co. et al.*, 85 M 270, 290, 278 P 521.

Collateral References

Highways—47.
39 C.J.S. Highways § 67.

32-107. (1616) Rights acquired by public in highway. By taking or accepting land for a highway, the public acquires only the right of way and the incidents necessary to enjoying and maintaining the same, subject to the regulations in this act and code provided.

History: En. Sec. 2620, Pol. C. 1895; re-en. Sec. 6, Ch. 44, L. 1903; re-en. Sec. 1342, Rev. C. 1907; re-en. Sec. 7, Ch. 72, L. 1913; re-en. Sec. 7, Ch. 141, L. 1915; re-en. Sec. 7, Ch. 172, L. 1917; re-en. Sec. 1616, R. C. M. 1921. Cal. Pol. C. Sec. 2631.

Collateral References

Right of municipality or public to use

of subsurface of street or highway for purposes other than sewers, pipes, conduits for wires, and the like, as affected by ownership of fee as between public and abutting owner. 11 ALR 2d 186.

Relative rights, as between municipality and abutting landowners, to minerals, oil, and gas underlying streets or alleys. 62 ALR 2d 1311.

CHAPTER 2

ROAD TAXES AND BONDS

- Section 32-201. Road tax levy—general road tax.
 32-202. Issuance of highway bonds—limit of indebtedness.
 32-203. Employers to furnish lists of employees liable to tax.
 32-204. County treasurer to notify employer of liability for tax.
 32-205. County commissioners may levy special tax for postwar construction of highways and bridges.
 32-206. Transfer of other funds.
 32-207. Expenditure postponed till termination of existing war emergency.
 32-208. Board of county commissioners shall adopt a budget.

32-201. (1617) Road tax levy—general road tax. For the purpose of raising revenue for the construction, maintenance, and improvement of public highways, the board of county commissioners of each county in this state may in their discretion levy and cause to be collected a general tax upon the taxable property in the county of not more than ten (10) mills on the dollar, which shall be payable to the county treasurer with other general taxes. There is also established a general road tax of two dollars (\$2.00) per annum on each male person over the age of twenty-one (21) years, and under the age of fifty (50) years, inhabitant within the county, and payable by each person liable therefor at any time within the year. The collection of these taxes shall be under the direction of the board of county commissioners; taxes from freeholders to be collected the same as other taxes, and from nonfreeholders as commissioners may direct; provided, that the foregoing provisions of this section shall not apply to incorporated cities and towns which, by ordinance, provide for the levy and collection of a like general tax and a like special tax within such cities and towns for road, street, and alley purposes. All moneys collected under the provisions of this act shall belong to the general road fund of the county.

History: Ap. p. Sec. 19, p. 110, L. 1874; re-en. Sec. 1070, 5th Div. Rev. Stat. 1879; amd. Sec. 1, p. 119, L. 1885; re-en. Sec. 1796, 5th Div. Comp. Stat. 1887; amd. Sec. 2640, Pol. C. 1895; amd. Sec. 1, p. 176, L. 1897; amd. Sec. 1, p. 69, L. 1899; amd. Sec. 11, Ch. 44, L. 1903; re-en. Sec. 1344, Rev. C. 1907; amd. Sec. 1, Ch. 2, Ch. 72, L. 1913; amd. Sec. 2, Ch. 2, Ch. 141, L. 1915; amd. Sec. 2, Ch. 2, Ch. 172, L. 1917; re-en. Sec. 1617, R. C. M. 1921; amd. Sec. 1, Ch. 2, L. 1933; amd. Sec. 1, Ch. 145, L. 1947. Cal. Pol. C. Secs. 2651-2655.

NOTE.—This section, before amendment, held a violation of Section 4, Article XII of the Constitution in that the legislature levied directly a poll tax for \$2.00. Opinions of Attorney General, Vol. 18, No. 178.

Exemption of Cities and Towns Not Applicable to Special Levy for Funding Bond Purposes

The exemption provided for by this section of cities and towns from payment of the five-mill levy, does not require county authorities to make the same exemption as to a special tax levy made necessary by delinquencies and required for funding outstanding registered road fund warrants, but such special tax may constitutionally be imposed upon city property, without being open to the charge of double taxation. State ex rel. Siegfried v. Carbon County, 108 M 510, 513, 92 P 2d 301.

DECISIONS UNDER FORMER LAW

Disposition of Proceeds of Tax

Construing this section, before amendment by chapter 2, Laws of 1933, authorizing counties to levy annually a general tax of not less than two nor more than

five mills for the construction and maintenance of public highways, the moneys collected to be placed in the general road fund, and section 1659, R. C. M. 1921 (since repealed) providing for the crea-

tion of special road districts, under which they are given power, *inter alia*, to levy a tax not to exceed two mills for general road purposes on property in such districts, held that the revenue collected from the latter levy, like that from the former, must be placed in the general road fund of the counties, both being for general road purposes, and not in the road fund of any special road district into which must go funds derived from a levy authorized in addition to the two mill levy, not to exceed five mills, for district purposes. *Special Road Dist. No. 8 v. Millis*, 81 M 86, 89, 90, 261 P 885.

References

State ex rel. Case v. Bolles et al., 74 M 54, 65, 238 P 586.

Collateral References

Highways⇒124, 125, 128, 150.

40 C.J.S. Highways §§ 286, 287, 290, 306.

Constitutionality of statutory provisions as to political corporations or divisions which shall bear cost of maintaining highways. 2 ALR 746.

Taxation for street or highway purposes as within constitutional provisions prohibiting legislature from imposing for town, county, city or corporate purposes, or providing that legislature may invent power to levy such taxes in local authorities. 46 ALR 710.

Provisions of tax statute as to time for performance of acts by boards or officers as mandatory or directory. 151 ALR 248.

32-202. (1618) Issuance of highway bonds—limit of indebtedness. Whenever, in the judgment of the board of county commissioners of any county, it becomes necessary or advisable for the construction or improvement of any main highway or state highway therein, to raise revenue in addition to that furnished by the taxes and licenses authorized by this act, it shall be lawful for such board to issue, on the credit of the county, coupon bonds to such amounts as said board may find necessary; provided that such bonds shall not, together with all other outstanding indebtedness of the county, exceed five per centum of the value of the taxable property within such county, to be ascertained by the last preceding general assessment therein; and provided, further, that such proceedings be had prior to and in the issuance of such bonds, as are required in the case of other county bonds.

History: En. Sec. 2, Ch. 2, Ch. 72, L. 1913; re-en. Sec. 2, Ch. 2, Ch. 141, L. 1915; re-en. Sec. 2, Ch. 2, Ch. 172, L. 1917; re-en. Sec. 1618, R. C. M. 1921.

Collateral References

Counties⇒173(2), 174.

20 C.J.S. Counties §§ 259, 261.

See generally, 43 Am. Jur. 261, *Public Securities and Obligations*.

Meaning of term "assessment" or "assessed valuation" when used as basis of tax or debt limit. 156 ALR 594.

32-203. (1619) Employers to furnish lists of employees liable to tax. Every employer having in his or its employment any person or persons liable for the special road tax of two dollars, mentioned in this act, must on or before the third Monday of March in each year, and monthly thereafter until the first day of October, furnish to the county treasurer a complete list of all the persons so employed, and if any such employer shall neglect or refuse to furnish such list, he shall forfeit to the county, in which said road tax is collectible, the sum of fifty dollars, to be recovered by an action brought in the name of the state in any justice court of said county, and the further sum of fifty dollars for each refusal or neglect to furnish such list after any demand shall have been made by the county treasurer. Upon the receipt of said lists it shall be the duty of said county treasurer to furnish to said employer furnishing such lists, printed special

road tax receipt books, with proper stubs containing memorandum of name, amount, and date attached.

History: Ap. p. Sec. 1838, 5th Div. Comp. Stat. 1887; amd. Sec. 2681, Pol. C. 1895; amd. Sec. 26, Ch. 44, L. 1903; re-en. Sec. 1353, Rev. C. 1907; amd. Sec. 3, Ch. 2, Ch. 72, L. 1913; re-en. Sec. 3, Ch. 2, Ch. 141, L. 1915; re-en. Sec. 3, Ch. 2, Ch. 172,

L. 1917; re-en. Sec. 1619, R. C. M. 1921. Cal. Pol. C. Sec. 2671.

Collateral References

Highways \Rightarrow 150.

40 C.J.S. Highways § 306.

32-204. (1620) County treasurer to notify employer of liability for tax.

If any person required to pay the special road tax mentioned in this act does not pay the same and has no property subject to taxation, and the person owning the same is in the employment of any other person, the county treasurer must deliver to the employer a written notice, stating the amount of tax due for such employee, and from the time of receiving said notice the employer is liable to pay said tax, and the tax so paid may be deducted by such employer from the amount then due or to become due to such employee.

History: Ap. p. Sec. 1837, 5th Div. Comp. Stat. 1887; amd. Sec. 2680, Pol. C. 1895; amd. Sec. 3, p. 176, L. 1897; amd. Sec. 27, Ch. 44, L. 1903; re-en. Sec. 1354, Rev. C. 1907; re-en. Sec. 4, Ch. 2, Ch. 72, L. 1913; re-en. Sec. 4, Ch. 2, Ch. 141, L. 1915; re-en. Sec. 4, Ch. 2, Ch. 172, L. 1917; re-en. Sec. 1620, R. C. M. 1921.

NOTE.—This section relating to collection of special road tax, held a violation of Section 4, Article XII of the Constitution, following Opinion No. 178, Vol. 18, construing section 32-201. Opinions of Attorney General, Vol. 18, No. 213.

32-205. County commissioners may levy special tax for postwar construction of highways and bridges. For the purpose of accumulating and providing postwar funds for the construction, improvement, repair and maintenance of public highways and bridges, the board of county commissioners of each county in this state may, in their discretion, levy and cause to be collected during each or either of the fiscal years beginning July 1, 1945 and ending June 30, 1946, and beginning July 1, 1946 and ending June 30, 1947, a special tax upon the taxable property in the county lying outside of the corporate limits of incorporated cities and towns, of not more than five (5) mills on the dollar, which shall be payable to the county treasurer with other taxes, which levies shall be in addition to all other levies now authorized by law to be made for road and bridge purposes. All moneys derived from such levies shall be placed in a special road and bridge fund and shall be kept separate from all other road and bridge moneys.

History: En. Sec. 1, Ch. 69, L. 1945; amd. Sec. 1, Ch. 149, L. 1947.

32-206. Transfer of other funds. The board of county commissioners of each county may, in their discretion, at the close of each of the fiscal years ending June 30, 1945, June 30, 1946, and June 30, 1947, transfer to such special road and bridge fund any unexpended and unappropriated funds remaining in the county road fund and in the county bridge fund, over and above the amount set apart and appropriated as a reserve for the then current fiscal year.

History: En. Sec. 2, Ch. 69, L. 1945.

32-207. Expenditure postponed till termination of existing war emergency. No expenditures for any purpose whatever shall be made from such special road and bridge fund until after April 1, 1947. After such date the board of county commissioners of any county having such fund may thereafter provide for the expenditure thereof for the purpose of constructing, improving, repairing, and maintaining the public highways and bridges of the county; provided that no expenditure in excess of ten thousand dollars (\$10,000.00) for any single purpose as defined in section 16-2009 shall be made from such fund without the approval of a majority of the electors voting on the question of such expenditure at an election to be provided by law.

History: En. Sec. 3, Ch. 69, L. 1945;
amd. Sec. 3, Ch. 149, L. 1947.

32-208. Board of county commissioners shall adopt a budget. After April 1, 1947, the board of county commissioners of any county having such special road and bridge fund may adopt a budget making appropriations therefrom for the construction, improvement, repair and maintenance of the public highways and bridges in the county for the remaining portion of the then current fiscal year, notice thereof being given, hearing thereon had and such budget adopted in the manner provided for emergency budgets by section 16-1907 for each fiscal year thereafter when any moneys are to be expended therefrom, the county budget shall contain and set forth a separate section as a budget for such special road and bridge fund, and all of the provisions of the county budget law shall apply thereto; provided, however, that at any time after the close of the fiscal year ending June 30, 1947, the board of county commissioners may in their discretion, instead of providing a separate budget for the expenditure of any moneys then in such special fund, transfer the same to the county road fund or to the county bridge fund or transfer a part thereof to each of such funds.

History: En. Sec. 4, Ch. 69, L. 1945;
amd. Sec. 4, Ch. 149, L. 1947.

CHAPTER 3

SUPERVISION OF PUBLIC HIGHWAYS

- Section 32-301. Highway proceedings to be included in minutes.
 32-302. Powers and duties of county commissioners respecting highways.
 32-303. County surveyor's duties in counties having total registered vote of fifteen thousand or over at last general election—salary.
 32-304. Road supervisor abolished, when.
 32-305. Purchase of machinery and materials.
 32-306. Road supervisors—appointment and compensation.
 32-307. Duties of road supervisors—reports, accounts and statements.
 32-308. Employment of laborers, teams, etc.
 32-309. Removal of obstructions and repair of bridges.
 32-310. Limit on amount expended in road district.
 32-311. Examination of supervisor's report—warrant for claims.
 32-312. Construction of drains and ditches—penalty for obstructions.
 32-313. Tools and implements for use of road supervisor.
 32-314. Inspection of highways and construction work—compensation.
 32-315. Law declared an emergency measure.
 32-316. Minute entry of inspection.

32-301. (1621) Highway proceedings to be included in minutes. The county clerk must include in the minutes of the board of county commissioners all proceedings and orders of the board relative to each highway within the county.

History: En. Sec. 1, Ch. 3 of Ch. 141, L. 1915; re-en. Sec. 1, Ch. 3 of Ch. 172, L. 1917; re-en. Sec. 1621, R. C. M. 1921.

Collateral References

Counties  53.

20 C.J.S. Counties § 91.

32-302. (1622) Powers and duties of county commissioners respecting highways. The boards of county commissioners of the several counties of the state have general supervision over the highways within their respective counties.

1. They may, in their discretion, keep the county divided into suitable road districts, place each of such road districts in charge of a competent road supervisor, and order and direct each of such supervisors concerning the work to be done upon the public highway in his district.

2. They may, in their discretion, provide and order the county surveyor, or if the county surveyor is incompetent, some other competent surveyor designated by the board, to prepare suitable plat books and have recorded therein with the county clerk a full description of every public highway within the county, showing each course by bearing and distance, with a full and complete map thereof, together with a record of all other proceedings with reference to the same.

3. They must cause to be surveyed, viewed, laid out, recorded, opened, worked, and maintained such highways as are necessary for public convenience as in this act provided, and cause to be erected and maintained thereon guideposts, as provided in this act.

4. They must abolish or abandon in the manner provided in this act such public highways as are not necessary for the public convenience.

5. They must contract, agree for, purchase, or otherwise lawfully acquire the right of way over private property for the use of public highways, and for that purpose institute, when necessary, proceeding under sections 93-9901 to 93-9926, paying for such right of way from the general road fund of the county; provided, however, where roads or trails are or will be dedicated to public use as a highway they may construct and maintain thereon substantially constructed cattle guards, appurtenances, and gates adjacent thereto.

6. They may, in their discretion, but subject to the limitation and provisions in the constitution and codes provided, issue bonds upon the faith and credit of the county for the construction or improvements of main highways, state highways, and bridges.

7. They may, in their discretion, but subject to the limitation and restriction provided in the codes for the letting of public contracts, let out by contract the construction, maintenance, and improvement of the public highways, and the construction, maintenance, or repairs of bridges when the amount of work to be done exceeds the sum of one thousand (\$1,000.00) dollars.

8. They may, in their discretion, cause to be done whatever may be necessary for the best interests of the roads and road districts of their several counties.

9. They may limit or forbid, temporarily, any traffic or class of traffic, on the public highways or any part thereof, when in their discretion it is necessary that traffic be so restricted in order to preserve or repair such highways.

10. They must make such reports, relating to the state roads under their supervision, to the state highway commission as may be requested by said commission.

11. They may, in their discretion, employ a competent road builder, who shall be paid for his services as such not to exceed twelve (\$12.00) dollars per day and in proportion for parts of days, and his actual expenses, who shall serve during the pleasure of the board, whose duty it shall be, under the direction and control of said board, to prescribe the times and places, when and where, all work shall be done on the roads of the county, report any delinquency or inefficiency of any road overseer, or any other person employed upon any such road, to the board of county commissioners, and perform such other duties as may be prescribed by said board. Provided, that in counties where the surveyor is not paid an annual salary, he may by agreement be employed by the county commissioners to perform the services of road builder and such county surveyor shall be paid for such services as above provided. Provided, that no county surveyor shall be paid hereunder for any duty otherwise required by law to be performed by him as county surveyor. Provided, however, that nothing in this act shall be construed to alter or repeal the provisions of sections 32-303 and 32-304.

12. The county commissioners of any county may, in their discretion, whenever highway construction work is to be financed in whole or in part by federal funds, and the secretary of commerce of the United States of America shall affirmatively find that under the circumstances relating to a given project some other method than competitive bidding is in the public interest, may in the construction of farm to market roads, also designated as secondary and feeder roads, enter into and contract jointly or independently with either the Montana state highway commission, the United States bureau of public roads, or any other federal agency heretofore established or which may be hereafter established, to acquire rights of way, survey, construct, and do any other thing essential and practical in securing such roads by force account, unit price or otherwise as may be agreed upon by said state highway commission and said board of county commissioners.

13. The county commissioners of any county may appoint a road foreman or supervisor who, subject to the direction and control of the commissioners, will prescribe the times and places, when and where, all work shall be done on the county roads. The foreman or supervisor shall report any delinquency or inefficiency of road employees to the commissioners for their action. The commissioners may authorize the road foreman or supervisor to hire and discharge road employees.

History: En. Sec. 2, Ch. 3, Ch. 172, L. 1925; amd. Sec. 1, Ch. 59, L. 1929; 1913; amd. Sec. 2, Ch. 3, Ch. 141, L. 1915; amd. Sec. 1, Ch. 102, L. 1947; amd. Sec. 2, Ch. 3, Ch. 172, L. 1917; amd. 1, Ch. 109, L. 1955; amd. Sec. 1, Ch. 128, Sec. 1, Ch. 15, Ex. L. 1919; re-en. Sec. L. 1959. Cal. Pol. C. Secs. 2641-2643. 1622, R. C. M. 1921; amd. Sec. 1, Ch. 128,

Cross-References

County commissioners' powers and duties, secs. 16-1004, 16-1005.

Gravel, stone and sand may be taken from state lands for highways, sec. 81-704.

Liability of Counties

Under the statutes of Montana with respect to the care of highways and liability for injury thereon, counties and cities stand in the same relation to the traveling public in so far as injury results from some act of an agent of either while engaged by either in its proprietary as distinguished from its governmental capacity. *Johnson v. City of Billings et al.*, 101 M 462, 478, 54 P 2d 579.

Liability of County Commissioners

The liability of county commissioners for injuries resulting from defective highways is not absolute, but depends upon whether they have been guilty of negligence. *Smith v. Zimmer*, 45 M 282, 303, 125 P 420.

Before the individual members of a board of county commissioners can be held personally answerable for negligent conduct in refusing to repair a public highway, the board of which they are members must have actual notice of such defective condition; but if, after such actual notice to the board, any two or more members thereof negligently or willfully refuse to cause the defect to be repaired, either directly or through the agency of the road supervisors, the members, so guilty of negligent conduct, are answerable to one who, without contributory negligence on his part, is injured thereby. *Smith v. Zimmer*, 45 M 282, 303, 125 P 420.

Road District Can Consist of Entire County

Under the highway law the entire county is within the county commissioners' juris-

diction so far as county roads are concerned, and as to them, unless divided into two or more road districts, the county constitutes a single road district, and so far as the general public is concerned, the result of a division is to limit the area over which each freeholder has a right of petition to the county commissioners for the establishment of the proposed right of way for a highway, and if no division is made, the freeholder's right remains co-extensive with the county's boundaries. *Park County v. Miller*, 117 M 157, 159, 159 P 2d 358.

Worked and Maintained

An allegation in a complaint against a county for work done on a road that since the construction of a road by the county it "cared for and maintained it" held the equivalent of the statutory requirement making it the duty of the board of county commissioners to cause highways to be "worked and maintained." *French v. County of Lewis and Clark*, 87 M 448, 454, 288 P 455.

References

Cited or applied as Sec. 2, Ch. 141, Laws 1915, before amendment, in *State v. Story*, 53 M 573, 581, 165 P 748; *State ex rel. McLeod v. District Court*, 67 M 164, 169, 215 P 240; *State ex rel. Livingston v. District Court*, 90 M 191, 300 P 916; *State ex rel. McMaster v. District Court*, 80 M 228, 232, 260 P 134; *Nelson et al. v. Jackson et al.*, 97 M 299, 303, 33 P 2d 822; *State v. Bourdeau*, 126 M 266, 246 P 2d 1037.

Collateral References

Counties \hookrightarrow 47; Highways \hookrightarrow 99.
20 C.J.S. Counties § 81; 40 C.J.S. Highways § 178.

Power and duty of highway officers as regards location or routes of roads to be constructed or improved. 91 ALR 242.

32-303. (1622.1) County surveyor's duties in counties having total registered vote of fifteen thousand or over at last general election—salary. The county surveyor of all counties having a total registered vote of fifteen thousand (15,000) or over, at the last general election shall have exclusive control, supervision and direction of all highways, bridges and causeways within his county, and in the exercise of such control, supervision and direction he shall keep all highways and bridges free and clear of all obstructions; cause highways to be graded, when needed, and maintain and repair the same; cause all bridges and causeways to be made, when needed, and keep the same maintained and in good repair and renew the same when destroyed; make all surveys; establish grades; prepare plans, specifications and estimates; keep accurate cost data; approve all claims against the county for all highway, bridge and causeway construction,

maintenance and repair prior to presentation to the board of county commissioners; employ deputies, men and teams, and discharge at his pleasure such deputies, men and teams, and determine how, when and where such deputies, men and teams shall work; purchase and secure all highway and bridge machinery and machinery equipment and tools to be used upon highways and bridges with the approval of the board of county commissioners; purchase and secure all highway, bridge and causeway supplies and materials with the approval of the board of county commissioners; from time to time make reports and estimates of all matters relating to highways and bridges when required by the board of county commissioners; perform such other duties as are now or which may be hereafter required by law, and shall receive an annual salary for performing the duties of said office in the amount of three thousand six hundred dollars (\$3,600.00) per annum to be paid out of the contingent fund of the county in which he holds office.

History: En. Sec. 1, Ch. 102, L. 1927; amd. Sec. 1, Ch. 21, L. 1929; amd. Sec. 1, Ch. 179, L. 1931.

last general election. State ex rel. Durland v. Board of County Commissioners, 104 M 21, 26, 64 P 2d 1060.

"Registered Vote"

The words "registered vote" mean voters who are registered and entitled to vote, and not voters who actually voted at the

Collateral References

Counties⌘88; Highways⌘105.
20 C.J.S. Counties § 139; 40 C.J.S. Highways § 177.

32-304. (1622.2) Road supervisor abolished, when. The office of road supervisor in the counties mentioned in section 32-303 is hereby abolished. Any and all laws relating to the powers and duties of road supervisors are hereby made applicable to county surveyors of all counties having a total registered vote of fifteen thousand (15,000) or over at the last general election in so far as the same are not inconsistent with any of the provisions of this act.

History: En. Sec. 2, Ch. 102, L. 1927; amd. Sec. 2, Ch. 21, L. 1929.

Collateral References

Counties⌘88.
20 C.J.S. Counties § 139.

32-305. (1623) Purchase of machinery and materials. The board of county commissioners may also, in their discretion, out of the general road fund of the county, purchase and operate grading and other machinery that they may deem necessary or desirable for the improvement of the public highways in the county, and may also acquire, out of the same fund, by purchase, condemnation, lease, or gift, deposits or quarries of suitable road-building material; and any crushed rock or gravel, not directly used or needed by such county in the construction, repair, or maintenance of its roads, may be sold at not less than actual cost of production to any person, firm, or corporation desiring to use the same upon any public street or highway within the county, and the proceeds of any such sale shall be paid into the general road fund.

History: En Sec. 3, Ch. 3 of Ch. 72, L. 1913; re-en. Sec. 3, Ch. 3 of Ch. 141, L. 1915; amd. Sec. 3, Ch. 3 of Ch. 172, L. 1917; re-en. Sec. 1623, R. C. M. 1921.

Collateral References

Highways⌘110.
40 C.J.S. Highways § 203.
43 Am. Jur. 737, Public Works and Contracts.

32-306. (1624) Road supervisors—appointment and compensation. Road supervisors, when appointed, shall serve during the pleasure of the board of county commissioners, and shall in all things be under the direction and control of said board. Every road supervisor must, before entering upon the duties of his office, be a resident elector of the road district for which he is appointed and must file with the county clerk the customary oath of office, together with a bond approved by said board for the faithful performance of his duties. As compensation for his services he shall receive not more than six dollars per day for eight hours' labor, but the time taken in going to or from his home to the place of labor shall not be included within such period of eight hours.

History: En. Sec. 4, Ch. 3, Ch. 72, L. 1913; amd. Sec. 4, Ch. 141, L. 1915; re-en. Sec. 4, Ch. 3, Ch. 172, L. 1917; amd. Sec. 2, Ch. 15, Ex. L. 1919; re-en. Sec. 1624, R. C. M. 1921.

References

Manley v. Harer et al., 73 M 253, 261, 235 P 757; Manley v. Harer et al., 82 M 30, 35, 264 P 937.

Collateral References

Counties 62, 65, 74(1).
20 C.J.S. Counties §§ 101, 106, 120.

32-307. (1625) Duties of road supervisors—reports, accounts and statements. Road supervisors, when appointed and under the direction and supervision of the board of county commissioners, must:

1. Take charge of all highways, bridges, and causeways within their respective districts; open all new roads when the same are duly established and ordered to be opened by the board of county commissioners; perform at the time and in the manner directed by the board of county commissioners whatever shall be lawfully directed by the board concerning the public highways within their respective districts.

2. Make and file with the county clerk verified reports quarterly, or oftener if required by the county commissioners, showing the number of days they have been employed during the previous three months and when and how employed; the number of days' labor performed upon the public highways in their respective districts, when and by whom performed, the character and kind of work done, and the wages agreed to be paid per day; the number of teams and implements, and the amount, value, and kind of material used, by whom and where used, and the price agreed to be paid therefor; the number and character of all the tools and implements belonging to the county within their respective districts.

3. Keep a correct account of all labor performed and animals, implements, or material furnished by himself or others upon the public highways, and give to persons performing such work or furnishing such animals, implements, or materials, a certificate stating the number of days' work performed, the character and kinds of such work, and the price agreed to be paid therefor; and the number of days any animals or implements have been used, and the price to be paid therefor, and the amount and character of all materials furnished.

History: Ap. p. Sec. 13, p. 68, L. 1899; amd. Sec. 2632, Pol. C. 1895; amd. Sec. 10, Ch. 44, L. 1903; re-en. Sec. 1360, Rev. C. 1907; amd. Sec. 5, Ch. 3, Ch. 72, L. 1913;

re-en. Sec. 5, Ch. 3, Ch. 141, L. 1915; re-en. Sec. 5, Ch. 3, Ch. 172, L. 1917; re-en. Sec. 1625, R. C. M. 1921. Cal. Pol. C. Sec. 2645.

Collateral References

Liability of municipality for damage

caused by fall of tree or limb. 14 ALR 2d 186.

32-308. (1626) Employment of laborers, teams, etc. Whenever it becomes necessary for any road supervisor, in the repairing of any public highway in his district, to secure the assistance of other persons, he shall be empowered to employ suitable laborers, teams, and implements, and to contract as to the price to be paid therefor, which must not exceed the rates fixed by the board of county commissioners for such laborers, teams, and implements per day of eight hours; provided, that the time taken by such laborers or teams in going to and from the place of labor shall not be included within such period of eight hours.

History: En. Sec. 6, Ch. 3, Ch. 72, L. 1913; re-en. Sec. 6, Ch. 3, Ch. 141, L. 1915; re-en. Sec. 6, Ch. 3, Ch. 172, L. 1917; amd. Sec. 3, Ch. 15, Ex. L. 1919; re-en. Sec. 1626, R. C. M. 1921.

Collateral References

Highways—113(2).

40 C.J.S. Highways § 208.

25 Am. Jur. 368, Highways, §§ 52 et seq.

Personal liability of highway officers for damage to or trespass upon land in connection with construction or maintenance of highway. 90 ALR 1481.

32-309. (1627) Removal of obstructions and repair of bridges. Whenever any public highway becomes obstructed from any cause, or any bridge needs repairing or becomes dangerous for the passage of teams or travelers, the board of county commissioners, or the county surveyor if he be the officer in charge of roads and bridges, upon being notified thereof, must cause such obstruction to be removed, or bridge repaired, for which purpose the board of county commissioners or the county surveyor, if he be the officer in charge of roads and bridges, or the road supervisor of the district may order out such number of inhabitants of the district as may be necessary to aid in removing such obstructions or repairing such bridge. If any person after three days' notice, whether said notice be oral or written, being physically able to respond, shall fail to be present at the time and place designated, or having attended, refuses to obey the direction of the person in charge of the work, or passes his time in idleness, or inattention to the duty assigned him, he shall be liable to punishment as for a misdemeanor; provided, that every person responding to any such order and performing the duties assigned him shall be compensated for his labor at a rate not to exceed four dollars (\$4.00) per day of eight hours, the time taken in going to and from the place of labor not included. Provided nothing in this act shall be construed as holding the county commissioners responsible or liable for anything other than willful, intentional neglect or failure to act.

History: Ap. p. Sec. 12, p. 119, Ex. L. 1873; amd. Sec. 24, p. 113, L. 1874; re-en. Sec. 1075, 5th Div. Rev. Stat. 1879; re-en. Sec. 1802, 5th Div. Comp. Stat. 1887; amd. Sec. 2720, Pol. C. 1895; amd. Sec. 36, Ch. 44, L. 1903; re-en. Sec. 1372, Rev. C. 1907; amd. Sec. 7, Ch. 3, Ch. 72, L. 1913; amd. Sec. 7, Ch. 3, Ch. 141, L. 1915; re-en. Sec. 7, Ch. 3, Ch. 172, L. 1917; re-en. Sec. 1627, R. C. M. 1921; amd. Sec. 1, Ch. 81, L. 1929.

Degree of Care

County commissioners must exercise ordinary care to keep its roads in a reasonably safe condition. *Big Head v. United States*, 166 F Supp 510, 515.

Insufficient Funds

Though a road supervisor or a board of county commissioners do not have sufficient funds at their disposal to repair

a dangerous place in a highway, this does not excuse them from taking suitable measures to give notice of the obstruction, or from providing suitable barriers to prevent a traveler from being injured. *Smith v. Zimmer*, 45 M 282, 301, 125 P 420.

Notice of Defects

The provision of this section requiring actual notice accompanies the waiver of sovereign immunity and would not apply where a private individual was involved. *Big Head v. United States*, 166 F Supp 510, 515.

Personal Liability of Commissioners

This section places the specific legal duty upon the board of county commissioners to remove obstructions in a highway, and after notice thereof any member of the board who neglects to do so becomes personally liable for any injury caused thereby, and they are not relieved of liability by merely instructing the road supervisor to erect and maintain barriers; hence an allegation in the complaint of one who has been injured, to the effect that the board had not instructed the supervisor to erect and maintain barriers, is not required to render the pleading sufficient. *Becker v. Chapple et al.*, 72 M 199, 202 et seq., 232 P 538.

32-310. (1628) Limit on amount expended in road district. The amount of expenditures in any road district for labor and teams, together with the compensation to be paid to the supervisor, shall not exceed in the aggregate the sum apportioned quarterly by the board of county commissioners to such road district, but if such sum is not sufficient, said board may appropriate from the general road fund any amount which may be necessary in their judgment for the use and benefit of such district; provided, however, that the full amount of all road taxes collected in remote and outlying districts shall be expended annually by the county commissioners on the roads within the boundaries of said districts.

History: En. Sec. 8, Ch. 3 of Ch. 72, L. 1913; amd. Sec. 8, Ch. 3 of Ch. 141, L. 1915; re-en. Sec. 8, Ch. 3, of Ch. 172, L. 1917; re-en. Sec. 1628, R. C. M. 1921.

In the matter of repairing defects on highways the board of county commissioners can act only as a board; hence where in an action against all three of the commissioners for failure to remedy defect after notice, the complaint was dismissed as to two of the defendants, the remaining commissioner, having been without authority to order the repairs made could not be held liable in damages. *Riggs v. Webb*, 77 M 80, 82, 249 P 1041.

References

Moore v. Industrial Accident Fund, 80 M 136, 139, 259 P 825.

Collateral References

Bridges—21(2); Highways—105(1), 151(1, 2).

11 C.J.S. Bridges § 35; 40 C.J.S. Highways §§ 177, 307, 309.

Liability of municipality for damage caused by fall of tree or limb as dependent on its governmental or proprietary capacity. 14 ALR 2d 186.

Liability of municipal corporation for injury or death occurring from negligence in construction or maintenance of electric street lighting pole. 19 ALR 2d 360.

Liability for injury or damage by tree or limb overhanging street or highway. 54 ALR 2d 1195.

Collateral References

Highways—95(2).
39 C.J.S. Highways §§ 158, 169.

32-311. (1629) Examination of supervisor's report—warrant for claims. The board of county commissioners, at the first monthly or quarterly meeting held after the filing of any supervisor's report, must examine the same and if found correct and the work reported to have been done was necessary and properly done, cause an order to be drawn on the county treasurer against the road fund for the amount due any road supervisor for his services; and upon the presentation of any certificate issued by road supervisors for labor performed by others, and the verification by the owners thereof, as in other cases of claims against the county, the board shall cause to be issued to the owner or holder of such claims a warrant

for the amount thereof, drawn on the county treasurer against the road fund.

History: Ap. p. Sec. 4, p. 118, L. 1885; re-en. Sec. 1834, 5th Div. Comp. Stat. 1887; re-en. Sec. 2695, Pol. C. 1895; amd. Sec. 33, Ch. 44, L. 1903; re-en. Sec. 1367, Rev. C. 1907; amd. Sec. 9, Ch. 3, Ch. 72, L. 1913; re-en. Sec. 9, Ch. 3, Ch. 141, L. 1915;

re-en. Sec. 9, Ch. 3, Ch. 172, L. 1917; re-en. Sec. 1629, R. C. M. 1921.

Collateral References

Counties⇒164.
20 C.J.S. Counties § 248.

32-312. (1630) Construction of drains and ditches—penalty for obstructions. The road supervisor, or other person designated by the board of county commissioners, has authority to open or construct drains and ditches for the making and preserving of roads and highways, doing as little injury as may be to the adjoining land, and any person stopping or obstructing the drains or ditches so made forfeits the sum of fifty dollars, to be recovered by the supervisor or board of county commissioners in a civil action in any court of competent jurisdiction. If any person feels aggrieved by the act of any supervisor, or other person designated by the board of county commissioners, he may make complaint in writing to the board of county commissioners, who will allow just damages and pay the same out of the road fund.

History: Ap. p. Sec. 1801, 5th Div. Comp. Stat. 1887; re-en. Secs. 2700 and 2701, Pol. C. 1895; amd. Sec. 34, Ch. 44, L. 1903; re-en. Sec. 1370, Rev. C. 1907; amd. Sec. 10, Ch. 3, Ch. 72, L. 1913; re-en. Sec. 10, Ch. 3, Ch. 141, L. 1915; re-en. Sec. 10, Ch. 3, Ch. 172, L. 1917; re-en. Sec. 1630, R. C. M. 1921.

Surveyor's Powers

In determining whether county commissioners must employ the county surveyor

to construct drains for the preservation of highways, this section, a special statute, must prevail over section 16-3302, requiring the county surveyor to make all surveys and establish all grades. *Durland v. Prickett et al.*, 98 M 399, 408, 39 P 2d 652.

Collateral References

Highways⇒105(1), 161.
40 C.J.S. Highways §§ 177, 229.

32-313. (1631) Tools and implements for use of road supervisor. Upon the requisition of any road supervisor, the board of county commissioners shall, whenever necessary, furnish to said supervisor any plows, scrapers, or other tools and implements necessary for the use of his road district, and cause the same to be paid for out of the general road fund of the county. The supervisor must preserve such tools and implements, and must not allow the same to be used except on public highways; at the expiration of his term of office, or upon his removal therefrom, he must turn over all such tools and implements to his successor or to the board of county commissioners.

History: Ap. p. Secs. 2710-2711, Pol. C. 1895; amd. Sec. 35, Ch. 44, L. 1903; re-en. Sec. 1371, Rev. C. 1907; amd. Sec. 11, Ch. 3, Ch. 72, L. 1913; re-en. Sec. 11, Ch. 3, Ch. 172, L. 1917; re-en. Sec. 1631, R. C. M. 1921.

Collateral References

Highways⇒110.
40 C.J.S. Highways § 203.

32-314. (1632) Inspection of highways and construction work—compensation. The board of county commissioners may direct the county surveyor or some member or members of said board, to inspect the condition of any highway or highways or proposed highway or any work,

contract or otherwise, under the direction, supervision or control of the county officials, being done or completed on any highway or bridge in the county during the progress of the work or before any work is commenced, or after completion and before payment therefor, and such person or persons making such inspection shall receive for making such inspection when so directed the sum of fifteen dollars (\$15.00) per day and actual expense, which shall be audited and allowed in the same manner as other claims against the county.

History: Ap. p. Sec. 1805, 5th Div. Comp. Stat. 1887; amd. Secs. 2740-2741, Pol. C. 1895; amd. Secs. 51-52, Ch. 44, L. 1903; amd. Secs. 1-2, Ch. 76, L. 1905; re-en. Secs. 1387-1388, Rev. C. 1907; amd. Secs. 12-13, Ch. 3, Ch. 72, L. 1913; amd. Secs. 12-13, Ch. 3, Ch. 141, L. 1915; amd. Sec. 1, Ch. 106, L. 1917; amd. Sec. 12, Ch. 3, Ch. 172, L. 1917; amd. Sec. 4, Ch. 15, Ex. L. 1919; re-en. Sec. 1632, R. C. M. 1921; amd. Sec. 1, Ch. 176, L. 1929; amd. Sec. 1, Ch. 84, L. 1953; amd. Sec. 1, Ch. 116, L. 1957.

NOTE.—This section, prior to 1929 amendment, held repealed by section 32-303 (1622.1) in so far as said section authorized the county commissioners to direct a member or members of the board to inspect highways or bridges or to employ deputies, men or teams for such work in counties of a registered vote of 15,000 or more and fix the compensation for such inspection or work. Opinions of Attorney General, Vol. 12, p. 75.

Compensation

As respects per diem, a commissioner may receive eight dollars per day for each day's attendance upon sessions of the board and for each day given to inspection of contract road work under order of the board, but shall receive no other compensation. *State v. Story*, 53 M 573, 583, 165 P 748. See also *Moore v. Industrial Accident Fund*, 80 M 136, 139, 259 P 825; *Fisher v. Stillwater County*, 81 M 31, 35, 261 P 607.

The fact that a county commissioner while supervising and inspecting road

construction work at times performed manual labor to assist in the work does not deprive him of the right to charge the proper fee for supervision; hence an instruction in effect advising the jury that while defendant commissioner could collect fees for inspection and supervision, any fee collected for inspection while doing manual labor was illegal, was erroneously prejudicial. *State v. Russell*, 84 M 61, 66, 274 P 148.

The complaint in action by a county surveyor against county commissioners and their official bondsmen to recover the compensation he would have received for checking and making plans and specifications for a bridge under this section, but for the fact that another engineer was employed for that purpose, did not state a cause of action since the section was so amended as not to allow any compensation for such work by the county surveyor. *Durland v. Prickett et al.*, 98 M 399, 410, 39 P 2d 652.

Title of Amendatory Act within Constitution

Title to Ch. 176, Laws 1929 held not to violate Art. V, Sec. 23 of the Constitution. *Durland v. Prickett et al.*, 98 M 399, 39 P 2d 652.

References

Hicks v. Stillwater County, 84 M 38, 45, 274 P 296.

Collateral References

Highways—105(1), 112.
40 C.J.S. Highways §§ 177, 201.

32-315. (1633) Law declared an emergency measure. This act is hereby declared to be an emergency law, and a law necessary for the immediate preservation of the public peace and safety.

History: En. Sec. 5, Ch. 15, Ex. L. 1919; re-en. Sec. 1633, R. C. M. 1921.

32-316. (1634) Minute entry of inspection. The county surveyor, or such member or members of said board, when they act jointly, if there be no prior board order so directing, must, at the next regular meeting of the board, make proper entries of such inspection.

History: Ap. p. Sec. 2742, Pol. C. 1895; Ch. 76, L. 1905; re-en. Sec. 1389, Rev. C. amd. Sec. 53, Ch. 44, L. 1903; amd. Sec. 3, 1907; amd. Sec. 14, Ch. 3, Ch. 72, L. 1913;

re-en. Sec. 14, Ch. 3, Ch. 141, L. 1915;
amd. Sec. 13, Ch. 3, Ch. 172, L. 1917; re-
en. Sec. 1634, R. C. M. 1921.

CHAPTER 4

ESTABLISHING, ALTERING AND VACATING PUBLIC HIGHWAYS

- Section 32-401. Petition by freeholders to establish, change or discontinue.
32-402. Contents of petition.
32-403. Investigation of petitions for change in or discontinuance of public highways.
32-404. Minute entry of action on petition—notice to interested parties.
32-405. Opening of highway—survey of same—claims for damages.
32-406. Determination of damages.
32-407. Award of damages deemed rejected, when—proceeding to secure right of way—validity.
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32-411. Notice to district supervisor of opening of highway—award of contract—bond of contractor.
32-412. Recording deeds and judgments for right of way.
32-413. Crossing of railroad, canals and ditches.
32-414. Removal of fences—notice.
32-415. Highways to follow subdivision or section lines.
32-416. Change of highway upon petition of freeholders.
32-417. Defects in proceedings not to invalidate.

32-401. (1635) Petition by freeholders to establish, change or discontinue. Any ten, or a majority of the freeholders of a road district, taxable therein for road purposes, may petition in writing the board of county commissioners to establish, change, or discontinue any common or public highway therein. When such a highway is petitioned for upon the dividing line between two counties, the same course must be pursued as in other cases, except that a copy of the petition must be presented to the board of county commissioners of each county, who shall act jointly.

History: En. Sec. 2750, Pol. C. 1895; amd. Sec. 55, p. 35, L. 1901; amd. Sec. 54, Ch. 44, L. 1903; re-en. Sec. 1390, Rev. C. 1907; amd. Sec. 1, Ch. 4, Ch. 72, L. 1913; re-en. Sec. 1, Ch. 4, Ch. 141, L. 1915; amd. Sec. 1, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1635, R. C. M. 1921. Cal. Pol. C. Sec. 2681.

Cross-Reference

Cemeteries, highway not to be laid through, sec. 9-118.

Indian Lands

Where in an action to enjoin the obstruction of an alleged public road over lands embraced in an Indian reservation it was agreed that no attempt had ever been made by legal authorities to open or lay out the road in question pursuant to sections 32-401 to 32-417, it was not such a public road as is recognized by federal authorities over Indian lands (Sec. 2, Ch. 161, 38 Stat. 1189) and court holding it was public road and directing removal of fences and gates committed error. *Peasley v. Trosper*, 103 M 401, 407, 63 P 2d 131.

Irregularities in Proceedings

In the absence of constitutional restrictions or prohibitory legislation, the people of a county can establish and construct as many highways, bridges, and ferries as they deem necessary, and by whatsoever procedure they may elect. The power of the county to establish a highway by any procedure it may elect, and to issue bonds for that purpose after a valid election, is not taken away because the requisite number of freeholders may not petition therefor, or because it may not be able to acquire rights of way, or because permission has not been obtained from congress to erect a bridge across a navigable stream, where permission has been obtained since the election. *Reid v. Lincoln County*, 46 M 31, 64, 125 P 429.

Petition Required

The legal prerequisite to the establishment of a right of way for proposed road is a petition by ten freeholders of the road district. *Park County v. Miller*, 117 M 157, 159, 159 P 2d 358.

Qualifications of Petitioners

In the absence of statutory provision, the commissioners are not required to state in their proceedings to open a road that the petitioners were citizens of the United States or the county. *Crowley v. Board of Commrs.*, 14 M 292, 297, 36 P 313.

A petition for the establishment of a highway will be held sufficient as against collateral attack by way of an action to quiet title to the land covered by the highway, on the ground that the signers of the petition were not qualified, if their qualifications appear either from the petition, from the record of the county commissioners' proceedings or from the evidence adduced on a hearing before the board. *Warren v. Chouteau County*, 82 M 115, 265 P 676.

State Highways

While the board of county commissioners, under section 32-508, is granted power to obtain a right of way of main highways by condemnation proceedings, and under sections 32-401 to 32-417, may upon petition signed by ten or a majority of the freeholders of a road district, proceed to the final establishment of common or public highway, including obtaining right of way therefor as provided by sections 32-405 and 32-407, there is no statutory provision authorizing it to procure a right of way for a state highway by condemnation proceedings after such highway has been approved, laid out and established by the state highway commission. *State ex rel. McMaster v. District Court*, 80 M 228, 234, 260 P 134.

The power conferred upon the state highway commission to establish and con-

struct highways does not include the power to vacate them, that power being lodged in the board of county commissioners on petition of the freeholders of the district. *State et al. v. Hoblitt et al.*, 87 M 403, 410, 288 P 181.

References

Hicks v. Stillwater County, 84 M 38, 274 P 296; *State ex rel. State Highway Commission v. District Court*, 105 M 44, 49, 69 P 2d 112; *Park County v. Miller*, 117 M 157, 158, 159 P 2d 358; *State ex rel. Walker v. Board of Commrs.*, 120 M 413, 187 P 2d 1013, 1014; *Sjostrum v. State Highway Commission*, 124 M 562, 228 P 2d 238.

Collateral References

Highways \Leftrightarrow 29(1), 72(2), 77(2).
39 C.J.S. Highways §§ 48, 101, 118.
25 Am. Jur., Highways, p. 368, §§ 52 et seq.; p. 406, §§ 105 et seq.

Constitutionality and construction of statute relating to location or relocation of highways. 63 ALR 516.

What justifies discontinuance of highway. 68 ALR 794.

Personal liability of highway officers for damage to or trespass upon land in connection with construction or maintenance of highways. 90 ALR 1481.

Power and duty of highway officers as regards location or routes of roads to be constructed or improved. 91 ALR 242.

Effect of regulations as to subdivision maps or plats upon vacation of streets and highways. 11 ALR 2d 587-595.

Power to directly regulate or prohibit abutter's access to street or highway. 73 ALR 2d 652.

DECISIONS UNDER FORMER LAW**Construction of Similar Sections**

See *Flynn v. Beaverhead County*, 54 M 309, 170 P 13, construing similar sec-

tions of Revised Codes of 1907, relating to vacating, opening, laying out, or changing highways.

32-402. (1636) Contents of petition. The petition must set forth and describe particularly the highways to be abandoned, discontinued, altered, or constructed, and if the same are to be altered, laid out, or constructed, the general route thereof, over what lands, who are owners thereof, whether such of them as can be found consent thereto, and if not, the probable cost of the right of way, where consent is not had, the necessity for, and advantage of the proposed road.

History: En. Sec. 2751, Pol. C. 1895; amd. Sec. 56, p. 35, L. 1901; amd. Sec. 55, Ch. 44, L. 1903; re-en. Sec. 1391, Rev. C. 1907; amd. Sec. 2, Ch. 4, Ch. 72, L. 1913; re-en. Sec. 2, Ch. 4, Ch. 141, L. 1915; re-en. Sec. 2, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1636, R. C. M. 1921. Cal. Pol. C. Sec. 2682.

References

State ex rel. McMaster v. District Court, 80 M 228, 234, 260 P 134; *Hicks v. Stillwater County*, 84 M 38, 274 P 296; *Park County v. Miller*, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways \Leftrightarrow 29(3), 72(2), 77(2).
39 C.J.S. Highways §§ 50, 101, 118.

32-403. (1637) Investigation of petitions for change in or discontinuance of public highways. When any petition is filed as authorized in the preceding section, the board of county commissioners shall, at their next regular or special meeting, or at some date within thirty days thereafter, proceed and cause an investigation to be made as to the feasibility, desirability, and cost of granting the prayer of said petition, causing such investigation to be had as may be necessary to properly determine the merits or demerits of the petition.

History: En. Sec. 3, Ch. 4 of Ch. 141, L. 1915; amd. Sec. 3, Ch. 4 of Ch. 172, L. 1917; amd. Sec. 1, Ch. 4, Ex. L. 1919; re-en. Sec. 1637, R. C. M. 1921.

References

State ex rel. McMaster v. District Court, 80 M 228, 234, 260 P 134; Hicks v. Still-

water County, 84 M 38, 274 P 296; Park County v. Miller, 117 M 157, 158, 159 P 2d 358; Miller v. Schrock, 135 M 409, 340 P 2d 154, 155.

Collateral References

Highways 33, 72(4), 77(5).
39 C.J.S. Highways §§ 48, 105, 121.

32-404. (1638) Minute entry of action on petition—notice to interested parties. After the commissioners shall have considered the petition, provided that not more than one member of the board of county commissioners and the county surveyor shall act as viewers in making the investigation, they shall make an entry on their minutes of their decision with reference thereto, and cause notice of their action on said petition to be sent by certified mail within ten (10) days to the petitioners and to all landowners as disclosed by the last assessment rolls of the county, owning land abutting the roadway proposed to be established, changed or discontinued.

History: En. Sec. 4, Ch. 4 of Ch. 172, L. 1917; re-en. Sec. 1638, R. C. M. 1921; amd. Sec. 1, Ch. 107, L. 1935; amd. Sec. 1, Ch. 123, L. 1961. Cal. Pol. C. Secs. 2685, 2686.

References

State ex rel. McMaster v. District Court,

80 M 228, 260 P 134; Hicks v. Stillwater County, 84 M 38, 274 P 296; Park County v. Miller, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways 53(1), 72(4), 77(5).
39 C.J.S. Highways §§ 70, 105, 121.

32-405. (1639) Opening of highway—survey of same—claims for damages. If the petition is for the opening of a highway, and the board grants the prayer of said petition and orders the same opened, they shall proceed at once to have the same opened to the public and declare it to be a public highway; and the board may order the county surveyor, or if the county surveyor is incompetent, some other competent surveyor designated by the board to survey the same and plat it and file his field notes with the county clerk and recorder, for which the surveyor shall receive seven dollars per day and actual traveling expenses.

The board of county commissioners, upon making each and every order establishing the location or alteration of any highway, must find the amount of damages sustained by each and every person owning or claiming lands, or any improvements thereon and affected thereby, such amounts to be paid to the proper owner or claimant, if known, upon their showing or establishing their right or title to such lands or improvements, and furnishing proper deeds and releases. If the awards are all accepted, the road must be declared a public highway and opened.

History: En. Sec. 5, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1639, R. C. M. 1921. Cal. Pol. C. Sec. 2689.

Benefit as Consideration to Landowner

It is not essential that the compensation due a non consenting landowner for land appropriated for a public highway be paid in money. The benefit which he might derive from the opening of the new road over a particular route might furnish consideration for the right of way over his land. *Flynn v. Beaverhead County*, 54 M 309, 313, 170 P 13.

County Surveyor To Do Surveying

Where county commissioners order a survey of a road to be made under this section, and propose to award compensation for the survey, the board must order the work to be done by the county surveyor, unless he be incompetent; in such circumstances the public is entitled to have the work done by the officer of their selection, and the permissive word "may" used in the section has the meaning of "must." *Durland v. Prickett et al.*, 98 M 399, 407, 39 P 2d 652.

Survey Not Mandatory

This section, by declaring that upon the filing of a petition for the opening of a highway, the board of county commissioners may order the county surveyor, or, if he be incompetent, some other surveyor to survey it, is permissive, not mandatory, where the highway is accurately described in the petition and accompanied by a sufficient plat; the law not requiring the doing of a useless thing. *Durland v. Prickett et al.*, 98 M 399, 406, 39 P 2d 652.

References

State ex rel. *McMaster v. District Court*, 80 M 228, 260 P 134; *Warren v. Chouteau County*, 82 M 115, 265 P 676; *Hicks v. Stillwater County*, 84 M 38, 274 P 296; *Park County v. Miller*, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways \Rightarrow 50.
39 C.J.S. Highways § 68.
See generally, 18 Am. Jur. 621, Eminent Domain.

32-406. (1640) Determination of damages. The damage must be determined by ascertaining the benefits and damages accruing to any person by reason of altering, changing, or laying out such roads, and the sum estimated, as benefits must be deducted from the sum estimated as damages, and the remainder, if any, shall be the amount of damages awarded.

History: En. Sec. 2760, Pol. C. 1895; re-en. Sec. 65, p. 38, L. 1901; re-en. Sec. 63, Ch. 44, L. 1903; re-en. Sec. 1399, Rev. C. 1907; re-en. Sec. 8, Ch. 4, Ch. 72, L. 1913; re-en. Sec. 8, Ch. 4, Ch. 141, L. 1915; re-en. Sec. 6, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1640, R. C. M. 1921. Cal. Pol. C. Sec. 2688.

References

State ex rel. *McMaster v. District Court*, 80 M 228, 260 P 134; *Hicks v. Stillwater County*, 84 M 38, 274 P 296; *Park County v. Miller*, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways \Rightarrow 41(2).
39 C.J.S. Highways § 62.

32-407. (1641) Award of damages deemed rejected, when—proceeding to secure right of way—validity. If any award of damages is not accepted within twenty days from the day of the award, it shall be deemed rejected by the landowners. The board must, by order, direct proceedings to procure the right of way to be instituted by the county attorney of the county as provided by sections 93-9901 to 93-9926, against all nonaccepting landowners. When the board of county commissioners direct the institution of such proceedings the failure of the board of county commissioners to give any notices, or to do any act or thing necessary to be done, as provided in the preceding sections of this chapter, shall in no matter affect or invalidate said proceedings to procure the right of way, nor shall such failure to give any notice as hereinbefore provided be considered by the court as a defense in any proceedings instituted for the purpose of procuring said right of way and such proceedings when instituted, shall be had and taken as separate and apart from any act of the board of county

commissioners hereinbefore mentioned, provided that the fact that rights of way sought to be secured shall have been declared by resolution of the board of county commissioners as necessary and desirable for the construction of a public highway shall be made to appear.

History: Ap. p. Sec. 2761, Pol. C. 1895; amd. Sec. 66, p. 38, L. 1901; amd. Sec. 64, Ch. 44, L. 1903; re-en. Sec. 1400, Rev. C. 1907; amd. Sec. 9, Ch. 4, Ch. 72, L. 1913; re-en. Sec. 9, Ch. 4, Ch. 141, L. 1915; amd. Sec. 7, Ch. 4, Ch. 172, L. 1917; amd. Sec. 2, Ch. 4, Ex. L. 1919; re-en. Sec. 1641, R. C. M. 1921. Cal. Pol. C. Secs. 2689-2690.

Finding Required

The finding of the board of county commissioners that the rights of way for establishment of a highway were "feasible and desirable" did not authorize a con-

demnation proceeding under this section requiring a finding that the rights of way are "necessary and desirable." *Park County v. Miller*, 117 M 157, 160, 159 P 2d 358.

References

State ex rel. *McMaster v. District Court*, 80 M 228, 260 P 134; *Hicks v. Stillwater County*, 84 M 38, 274 P 296.

Collateral References

Eminent Domain \Rightarrow 166.
29 C.J.S. Eminent Domain \S 209.

32-408. (1642) Fund out of which expenses are to be defrayed. All awards by agreement, ascertained by the board of county commissioners or by the proper court, and all expenses, including their own expenses and per diem as is authorized by section 16-912, must be paid out of the general road fund on the order of the board of county commissioners.

History: Ap. p. Sec. 2762, Pol. C. 1895; re-en. Sec. 67, p. 38, L. 1901; amd. Sec. 65, Ch. 44, L. 1903; re-en. Sec. 1401, Rev. C. 1907; re-en. Sec. 10, Ch. 4, Ch. 72, L. 1913; re-en. Sec. 10, Ch. 4, Ch. 141, L. 1915; amd. Sec. 8, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1642, R. C. M. 1921. Cal. Pol. C. Sec. 2691.

References

State ex rel. *McMaster v. District Court*, 80 M 228, 260 P 134; *Hicks v. Stillwater County*, 84 M 38, 274 P 296; *Park County v. Miller*, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways \Rightarrow 99 $\frac{1}{4}$.
40 C.J.S. Highways \S 176.

32-409. (1643) Record of opening or altering of highway. If a highway is opened or altered, the findings of the commissioners and the plat fieldnotes, and report of the surveyor must be recorded in the office of the county clerk in books kept for that purpose.

History: En. Sec. 2763, Pol. C. 1895; re-en. Sec. 68, p. 38, L. 1901; re-en. Sec. 66, Ch. 44, L. 1903; re-en. Sec. 1402, Rev. C. 1907; re-en. Sec. 11, Ch. 4, Ch. 72, L. 1913; re-en. Sec. 11, Ch. 4, Ch. 141, L. 1915; re-en. Sec. 9, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1643, R. C. M. 1921.

References

State ex rel. *McMaster v. District Court*, 80 M 228, 260 P 134; *Hicks v. Stillwater County*, 84 M 38, 274 P 296; *Park County v. Miller*, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways \Rightarrow 54, 70.
39 C.J.S. Highways $\S\S$ 69, 96.

32-410. (1644) Opening highway through or along growing crops. No highway must be ordered opened through fields of growing crops, or along the line where crops would thereby be exposed to stock, until the owner thereof has sufficient time to harvest and care for such crops.

History: En. Sec. 2765, Pol. C. 1895; re-en. Sec. 70, p. 38, L. 1901; re-en. Sec. 68, Ch. 44, L. 1903; re-en. Sec. 1404, Rev. C. 1907; re-en. Sec. 13, Ch. 4, Ch. 72, L. 1913; re-en. Sec. 13, Ch. 4, Ch. 141, L. 1915;

re-en. Sec. 10, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1644, R. C. M. 1921.

References

State ex rel. *McMaster v. District Court*,

80 M 228, 260 P 134; Hicks v. Stillwater County, 84 M 38, 274 P 296; Park County v. Miller, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways⇒49.
39 C.J.S. Highways § 68.

32-411. (1645) Notice to district supervisor of opening of highway—award of contract—bond of contractor. When a highway is to be opened, constructed, altered, or widened, the county clerk must notify the supervisor of the proper district and furnish him with a certified copy of the order of the county commissioners; provided, that when the estimated cost of opening, constructing, altering, or widening exceeds two hundred dollars, the work may, in the discretion of the county commissioners, be let by contract; and if such estimated cost exceeds the sum of five hundred dollars, such work may be let by contract unless the board shall find that such work may be otherwise done at less cost; but before any contract shall be let, as provided herein, the board of county commissioners shall advertise for bids therefor, at least once a week for two successive weeks, in a newspaper of general circulation in the county, and the contract shall then be awarded to the lowest responsible bidder, who shall, before entering upon the performance of the work, execute and deliver to the board of county commissioners an undertaking with two or more sureties, to be approved by the board of county commissioners, in a sum not less than equal the amount for which the contract is awarded, and conditioned for the prompt, faithful, and efficient performance of such work; provided, however, the board of county commissioners may reserve the right to reject any and all bids.

History: Ap. p. Sec. 2766, Pol. C. 1895; amd. Sec. 69, Ch. 44, L. 1903; re-en. Sec. 1405, Rev. C. 1907; amd. Sec. 14, Ch. 4, Ch. 72, L. 1913; amd. Sec. 14, Ch. 4, Ch. 141, L. 1915; amd. Sec. 11, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1645, R. C. M. 1921.

References

State ex rel. McMaster v. District Court,

80 M 228, 260 P 134; Hicks v. Stillwater County, 84 M 38, 274 P 296; French v. County of Lewis and Clark, 87 M 448, 455, 288 P 455; Park County v. Miller, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways⇒101, 113(1, 5).
40 C.J.S. Highways §§ 192, 210.

32-412. (1646) Recording deeds and judgments for right of way. In all cases where consent to use the right of way for a highway is voluntarily given, purchased, or condemned and paid for, either an instrument in writing, conveying the right of way and incident thereto, signed and acknowledged by the party making it, or a certified copy of the judgment of the court condemning the same, must be made and filed and recorded in the office of the county clerk, in which the land so conveyed or condemned must be particularly described.

History: En. Sec. 2767, Pol. C. 1895; re-en. Sec. 72, p. 39, L. 1901; re-en. Sec. 70, Ch. 44, L. 1903; re-en. Sec. 1406, Rev. C. 1907; re-en. Sec. 15, Ch. 4, Ch. 72, L. 1913; re-en. Sec. 15, Ch. 4, Ch. 141, L. 1915; re-en. Sec. 12, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1646, R. C. M. 1921. Cal. Pol. C. Sec. 2693.

References

State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; Hicks v. Stillwater County, 84 M 38, 274 P 296; Park County v. Miller, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways⇒54.
39 C.J.S. Highways § 73.

32-413. (1647) Crossing of railroad, canals and ditches. Whenever highways are laid out across railroads, canals, or ditches, on public lands, the owners or corporations using the same must, at their own expense, so prepare their roads, canals, or ditches, that the public highway may cross the same without damage or delay; and when the right of way for a public highway is obtained through the judgment of any court over any railroad, canal, or ditch, no damage must be awarded for the simple right to cross the same.

History: En. Sec. 2768, Pol. C. 1895; re-en. Sec. 73, p. 39, L. 1901; re-en. Sec. 71, Ch. 44, L. 1903; re-en. Sec. 1407, Rev. C. 1907; re-en. Sec. 16, Ch. 4, Ch. 72, L. 1913; re-en. Sec. 16, Ch. 4, Ch. 141, L. 1915; re-en. Sec. 13, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1647, R. C. M. 1921. Cal. Pol. C. Sec. 2694.

Cross-References

Railroad crossings, regulations outside cities, secs. 72-701 to 72-712.

Railroad crossings, signals, secs. 72-164 to 72-168.

References

Knott v. Pepper, 74 M 236, 244, 239 P 1037; State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; Hicks v. Stillwater County, 84 M 38, 274 P 296; Park County v. Miller, 117 M 157, 158, 159 P 2d 358.

Collateral References

Canals↔17; Railroads↔96.
12 C.J.S. Canals §16; 74 C.J.S. Railroads §156.

32-414. (1648) Removal of fences—notice. When the alteration of an old or the opening up of a new road makes it necessary to remove the fences on land given, purchased, or condemned by order of the court for road or highway purposes, notice to remove the fence must be given by the road supervisor, or other person designated by the board of county commissioners, to the owner, the occupant, or agent, by registered mail, postage prepaid, to his or her address; and if the same is not done within ten days thereafter, or commenced and prosecuted with due diligence, the road supervisor or other person designated by the board of county commissioners must cause it to be removed at the expense of the owner and recover of him the cost of such removal, and the fence material may be sold to satisfy the judgment.

History: En. Sec. 2769, Pol. C. 1895; re-en. Sec. 74, p. 39, L. 1901; re-en. Sec. 72, Ch. 44, L. 1903; re-en. Sec. 1408, Rev. C. 1907; re-en. Sec. 17, Ch. 4, Ch. 72, L. 1913; amd. Sec. 17, Ch. 4, Ch. 141, L. 1915; re-en. Sec. 14, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1648, R. C. M. 1921. Cal. Pol. C. Sec. 2695.

References

State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; Hicks v. Stillwater County, 84 M 38, 274 P 296; Park County v. Miller, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways↔102.
40 C.J.S. Highways §181.

32-415. (1649) Highways to follow subdivision or section lines. Highways must be laid out and opened when practicable upon subdivision or section lines; provided, however, that this section shall not be construed to prevent roads being laid out on diagonal lines when public purposes shall be best subserved thereby.

History: En. Sec. 2770, Pol. C. 1895; re-en. Sec. 75, p. 40, L. 1901; re-en. Sec. 73, Ch. 44, L. 1903; re-en. Sec. 1409, Rev. C. 1907; re-en. Sec. 18, Ch. 4, Ch. 72, L. 1913; re-en. Sec. 18, Ch. 4, Ch. 141, L. 1915;

re-en. Sec. 15, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1649, R. C. M. 1921.

References

State ex rel. McMaster v. District Court,

80 M 228, 260 P 134; Hicks v. Stillwater County, 84 M 38, 274 P 296; Park County v. Miller, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways 103.
40 C.J.S. Highways § 179.

32-416. (1650) Change of highway upon petition of freeholders. Upon petition signed by a majority of the freeholders or owners residing upon any common highway, or portion thereof, petitioning that such highway or a portion thereof be so changed as to run on subdivision or section lines, the board of county commissioners must proceed to investigate the same, to all intents and purposes as though it were a petition to establish, change, or discontinue any common highway, as such proceedings are provided for in this chapter, and after such investigation or hearing, may make such change; provided, it can be done without material damage, injury, or serious inconvenience to the public customarily using such highway or portion thereof; provided, further, that those petitioning for such change shall bear all or such portion of the cost and expense thereof as the county commissioners may order.

History: Ap. p. Sec. 2771, Pol. C. 1895; re-en. Sec. 76, p. 40, L. 1901; re-en. Sec. 74, Ch. 44, L. 1903; re-en. Sec. 1410, Rev. C. 1907; amd. Sec. 19, Ch. 4, Ch. 72, L. 1913; amd. Sec. 19, Ch. 4, Ch. 141, L. 1915; re-en. Sec. 16, Ch. 4, Ch. 172, L. 1917; re-en. Sec. 1650, R. C. M. 1921.

References

State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; Hicks v. Stillwater County, 84 M 38, 274 P 296; Park County v. Miller, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways 70-72.
39 C.J.S. Highways §§ 99, 112.

25 Am. Jur., Highways, p. 368, §§ 52 et seq.; p. 406, §§ 105 et seq.

Constitutionality and construction of statute relating to location or relocation of highways. 63 ALR 516.

What justifies discontinuance of highway. 68 ALR 794.

Personal liability of highway officers for damage to or trespass upon land in connection with construction or maintenance of highways. 90 ALR 1481.

Power and duty of highway officers as regards location or routes of roads to be constructed or improved. 91 ALR 242.

32-417. (1651) Defects in proceedings not to invalidate. None of the proceedings authorized by this chapter shall be invalid by reason of any defect, informality, or irregularity therein which does not materially affect the interests of the county, or prejudice the substantial rights of property owners immediately concerned.

History: En. Sec. 20, Ch. 4 of Ch. 72, L. 1913; re-en. Sec. 20, Ch. 4 of Ch. 141, L. 1915; re-en. Sec. 17, Ch. 4 of Ch. 172, L. 1917; re-en. Sec. 1651, R. C. M. 1921.

References

State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; Hicks v. Stillwater County, 84 M 38, 274 P 296; Peasley v.

Trosper et al., 103 M 401, 411, 64 P 2d 109; Park County v. Miller, 117 M 157, 158, 159 P 2d 358.

Collateral References

Highways 50, 72, 77, 79(1), 101, 105 (1), 107.

39 C.J.S. Highways §§ 68, 100, 112, 117, 130; 40 C.J.S. Highways §§ 177, 192.

CHAPTER 5

LOCAL IMPROVEMENT DISTRICTS

Section 32-501. Duty of county commissioners to construct main highways and levy assessments.

32-502. Resolution of public interest.

32-503. Petition for construction or improvement of highway.

32-504. Proceedings upon receipt of petition.

- 32-505. Duty of supervisors and county surveyor.
- 32-506. Formation and boundaries of district.
- 32-507. Report of county surveyor—order creating district.
- 32-508. Determination of amount of damages by condemnation proceedings.
- 32-509. Proportional share of costs to be stated in petition, when—order of board concerning.
- 32-510. Payment of county's share of expense.
- 32-511. Letting of contract—conditions of same.
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- 32-513. Appointment of inspector—compensation of inspector and supervisors—construction by county—lien on lands.
- 32-514. Apportionment of costs—assessment-roll, contents, notice and confirmation of—correction of errors.
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- 32-519. Order for issuance of bonds—form and contents.
- 32-520. Notice in case of payment by special bonds—contents—payment of assessment—redemption of land by payment of assessment.
- 32-521. Issuance of special bonds to contractor or sale of same.
- 32-522. Payment of interest on bonds—retirement of bonds.
- 32-523. Collection of assessments by suit of owner of bonds.
- 32-524. Auditing and payment of claims and accounts.
- 32-525. Disposition of residue of funds.
- 32-526. Completed road to be deemed a main highway.
- 32-527. Construction of chapter.

32-501. (1676) Duty of county commissioners to construct main highways and levy assessments. The board of county commissioners of any county in this state shall have power as hereinafter provided and it shall be its duty to cause to be constructed, laid out, and improved main highways within their respective counties and to levy and cause to be collected an assessment upon all lots, tracts and parcels of land specifically benefited by such improvements, laying out, or construction for paying the cost and expense thereof which assessment shall become a first lien upon the property liable for, prior and superior to all other liens and encumbrances, and to provide for the payment of such assessment either on the immediate payment plan or by installments, and to issue local improvement district bonds and coupons for each installment.

History: En. Sec. 1, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1676, R. C. M. 1921.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

Collateral References

Highways 99, 105(1).
40 C.J.S. Highways §§ 177, 179.

32-502. (1677) Resolution of public interest. Upon presentation of a petition as provided in this act, the board of county commissioners shall pass a resolution that the public interest demands the improvement, laying out, or construction of such road, or part thereof, and described in such resolution, but such description shall not include any portion of a highway within the boundaries of any city or incorporated town.

History: En. Sec. 2, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1677, R. C. M. 1921.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

Collateral References

Highways 101, 107(1).
40 C.J.S. Highways § 192.

32-503. (1678) Petition for construction or improvement of highway.

The owners of two-thirds of the lineal feet of land fronting on such road or proposed road, or part thereof, sought to be laid out, constructed, or improved, may present to the board of county commissioners, a petition setting forth that the petitioners are such owners and that they desire such road to be opened, laid out, or constructed under the provisions of this act; the kind and nature of the improvement desired and the mode of payment of the assessments to be levied for defraying the cost thereof. If any such property stands in the name of a deceased person or any person for whom a guardian has been appointed, the signature of the executor, administrator or guardian, as the case may be, shall be deemed equivalent to the signature of the owner of the property.

History: En. Sec. 3, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1678, R. C. M. 1921.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

Collateral References

Cotenancy as factor in determining representation of property owners in petition for public improvement. 3 ALR 2d 127.

32-504. (1679) Proceedings upon receipt of petition.

On receipt of such petition the board shall make an order appointing a place in the vicinity of said road and fix the time when said petitioners and all owners of the land fronting upon said road or lands owned within two miles on either side of said road and upon whose lands special assessments will be levied to pay for such construction or improvements may meet with the county surveyor or his duly appointed deputy and the county clerk shall immediately notify the said county surveyor of such meeting and shall cause a notice thereof to be given by publication in a newspaper printed and published in the vicinity of said road and nearest thereto, in said county, for three consecutive weeks next prior to the time of such meeting, which notice shall state the time and place of said meeting and in general terms the kind of construction and improvements petitioned for, the place of beginning, intermediate points and place of determination of said road or the portion thereof sought to be constructed and improved. At the said meeting the county surveyor or his deputy or in the absence of both some one of the said landowners present, shall preside, and said petitioners and said owners, as well as other owners of such land, shall proceed to elect three of their number as a committee of supervisors, at least one of whom shall be chosen from those who signed said petition. The majority of said owners present and voting at such meeting shall be sufficient to such election, and said presiding officer shall declare and certify to said board of county commissioners the names of such owners so elected as such committee of supervisors. The persons so elected shall qualify immediately by taking an oath that they are owners of lands benefited by said improvements and to be included within the local assessment district, and that they will fully, impartially, and faithfully perform their duties as supervisors to the best of their ability, which said oath may be administered by any one authorized to administer oaths, or by said county surveyor or his deputy, and are both hereby authorized to administer the same.

History: En. Sec. 4, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1679, R. C. M. 1921.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

32-505. (1680) Duty of supervisors and county surveyor. It shall be the duty of said supervisors and county surveyor or his deputy, to forthwith proceed to view, examine and survey said road sought to be constructed or improved, that said surveyor make plans and specifications as well as possible and estimate the cost of such construction; to examine and determine the lands that will be specially benefited by such improvement or construction and should be included within the local district that is to be assessed to defray the cost and expense, and such improvements and benefits; to ascertain all if any damage or injury to the property; if any person or persons will be sustained by or in consequence of the making of such improvement or construction for the payment of which such local assessment district would be liable, and in so far as may be obtained without cost to the said assessment district the release in writing from each person or persons of their claim in such damage or injury or, in case of failure so to do, arrange in so far as may be, in such release to be given, upon the approval or consent, for such terms as to amount as may be deemed fair and reasonable, to be paid from the moneys collected upon the assessment of said district; and said surveyor shall without delay prepare such plan and specifications and an estimate of the cost of such improvement and construction enclosing therein all expenses incident thereto, and prepare a plat and description of such local assessment district and a description of several tracts or parcels of land included therein and the valuation of said lands as the same appear upon the last annual assessment-roll of the county made for the purpose of levying general taxes thereon.

History: En. Sec. 5, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1680, R. C. M. 1921.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

Collateral References

Highways 90, 103.
39 C.J.S. Highways § 145; 40 C.J.S. Highways § 179.

32-506. (1681) Formation and boundaries of district. The local assessment district shall be constituted and the boundaries thereof fixed as follows: The lands extending from the center of the road one-half mile on each side thereof, to wit: a distance of one mile in width shall constitute "Part One" of said local assessment district; "Part Two" of said local assessment district shall be that portion of said lands embraced within an area one mile wide on each side of part one, and "Part Three" of said local assessment district shall be all lands lying within the area one mile wide extending along part two of said district; all of said division shall extend the full length of said proposed road and one mile beyond the terminus thereof, unless said local committee of supervisors shall otherwise provide. Each separate tract or parcel of land lying and being in part one of said district shall be assessed and be subject to a charge for a proportional part of forty-five per cent of the whole cost of construction work or improvement payable by said district and said lands shall be subject to a lien therefor until said assessments shall be paid; each separate tract or parcel of land in said part two of said district shall be assessed and subject to a charge for a proportional part of thirty-five per cent of said whole cost of expense of said construction work and improvements as-

sessable against said entire district and be subject to a lien therefor until all of said assessments shall have been paid; each tract or parcel of land in said part three of said district shall be assessed and subject to a charge, a proportional part of twenty per cent of said whole cost and expense of said construction work and improvements assessable to said district and all of said lands therein shall be subject to a lien for said assessment until all of said assessment has been paid. The charge upon the several tracts or parcels of land to each subdivision of said district shall be assessed ratable according to the front-foot plan; that is to say, one foot of longitude measured along the road constituting the center of such improvement district, and extending latitudinally across the subdivision shall be taken as the unit by which to determine the proportion of the assessment, so that a unit in each subdivision are not equal to each other the rates fixed for each subdivision will be eight hundred and eighty square feet to superficial area. If the area of said subdivision are not equal to each other the rates fixed for each subdivision shall be fixed on the basis that the benefit conferred on eight hundred and eighty square feet of land in subdivisions first, second, and third, are related to each other as are the numbers forty-five, thirty-five, and twenty, respectively.

History: En. Sec. 6, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1681, R. C. M. 1921.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

32-507. (1682) Report of county surveyor—order creating district. When the county surveyor shall have completed the said work of making estimates and surveying the said road, he shall at the next annual meeting of the board of county commissioners render a detailed report to the board that the maps, descriptions, plans, specifications, and details and estimates of damages, costs and expenses, and if it should appear from such report that the whole amount of the damages, costs and expenses of such construction and improvements chargeable as a lien against the property specially benefited within the improvement district, does not exceed fifty per cent of the total assessed valuation of the lots, tracts, and parcels of land contained in such improvement districts, as the same appears upon the last annual assessment-roll of the county, the said board shall make and enter upon the reports, an order that such improvements and construction be made, thus creating such local improvement district for the payment of such damages, costs, and expenses of making such improvements and construction by special assessment of the property in such district specially benefited; to be known and designated local improvement district No. in county, Montana, and such report shall be kept on file in the office of said board as well as in the office of the county surveyor.

History: En. Sec. 7, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1682, R. C. M. 1921.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

32-508. (1683) Determination of amount of damages by condemnation proceedings. When the county surveyor and local supervisors are unable to agree with the owner of any lands upon the amount of damages sustained by the taking or injuring of his property by reason of making such

improvements, they shall in said report to the board set forth such fact, with the statement of their reasons therefor, and such board of county commissioners shall cause the amount thereof to be ascertained and determined by condemnation proceedings and paid, in the same manner as damages are ascertained, determined, and paid when new roads are laid out and opened by the board; and such damages and the expenses incident to ascertain same shall be advanced on the order of the board, from the funds of the county, so that the progress of such work shall not be delayed, and said general fund may be thereafter reimbursed from the money collected for the local improvement district.

History: En. Sec. 8, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1683, R. C. M. 1921.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

Collateral References

Eminent Domain \Rightarrow 166.

29 C.J.S. Eminent Domain § 209.

Power to include in special assessment, interest accruing during the construction of the public improvement and running until special assessments therefor become due. 58 ALR 2d 1343.

32-509. (1684) Proportional share of costs to be stated in petition, when—order of board concerning. When the local improvement district is being laid out and roads constructed and improved therein, the petitioners therefor, in the petition provided for in this act, shall state therein the proportional share of the costs and expenses of said work of improvements that the said local improvement district will agree to assume and pay; which said sum must not be less than thirty-five per cent thereof and may be as much as seventy-five per cent thereof.

Whenever an agreement has been made and entered into between the said proposed local district and the said board of county commissioners, specifying the amount that shall be paid by said local district and the amount that shall be paid from the county funds, the board shall make an order to that effect on the records of the proceedings of such county commissioners.

History: En. Sec. 9, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1684, R. C. M. 1921.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

Collateral References

Highways \Rightarrow 119.

40 C.J.S. Highways § 207.

32-510. (1685) Payment of county's share of expense. The board of county commissioners shall have the power and it shall be its duty to order paid from the county funds the share of the county for the construction or improvement of the main highway in said local improvement district as in this act provided, not to exceed, however, sixty-five per cent of the cost of construction and laying out or improving of such highway and such amount so ordered shall be the proper charge against the county wherein the improvement or construction is made and the same shall be paid by the county treasurer of such county upon warrants duly drawn as ordered by the board of county commissioners.

History: En. Sec. 10, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1685, R. C. M. 1921.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

32-511. (1686) Letting of contract—conditions of same. After the board has made the order creating and establishing the local improvement district, the local committee of supervisors shall let the contract for furnishing the necessary materials and the performance of the work and labor necessary for the construction and completion of said road according to said plans and specifications and under the supervision of the county surveyor they shall advertise for bids for the construction, laying out or improving of such main highway, and fix the time for opening such bids at the office of the board of county commissioners and award such contract to the lowest responsible bidder, except that no contract shall be awarded at a greater sum than the estimate of cost of such work hereinbefore provided for. The said work may be let to one or more contractors or all of same may be let in one contract or in separate contracts in the discretion of said local supervisors. The committee of supervisors may reject any and all bids and before the execution of any contract they shall require a bond satisfactory to them that the contractor will furnish the required material and perform the required work upon the terms specified in the contract and within the time prescribed; and as a bond of indemnity against any direct or indirect damages that shall be suffered or claimed for injury of persons or property during the construction of said improvement and until the same is accepted.

Partial payments may be provided for in the contract, and paid in the manner herein provided when certified by the county surveyor and committee of supervisors to an amount not exceeding eighty per cent of the value of the work done and the materials, provisions and supplies furnished and the said contract shall provide that at least twenty per cent of the estimated amount shall be retained to secure the payment to laborers who have labored on such work and to those who have furnished materials, provisions and supplies for the prosecution of such work, and such laborers and those who have furnished materials, provisions and supplies shall have thirty days after the work has been completed or material, provisions and supplies furnished, for lien on such twenty per centum so reserved; providing, notice thereof in writing shall have been filed with the committee of supervisors within said thirty days, which lien shall be senior to all other liens, such as judgment, garnishment, or judgment liens, and no improvements or construction shall be deemed to be completed until the committee of supervisors have filed with the clerk of the board of county commissioners a statement signed by a majority of them, same to have been completed and that all labor, material, provisions and supply liens have been discharged. Such contract shall be executed in the name and on the behalf of the county by the board of county commissioners and attested with the seal thereof, for the use and benefit of said local improvement district; but such county shall not thereby be rendered subject to any claim or liability in a greater sum than that agreed upon with said proposed assessment district as provided in the order fixing the amount chargeable to said county.

History: En. Sec. 11, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1686, R. C. M. 1921; amd. Sec. 1, Ch. 13, L. 1925.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

Collateral References
Highways 113.

40 C.J.S. Highways § 208.
25 Am. Jur. 889, Highways, §§ 602 et seq.

32-512. (1687) Notice for bids—opening bids—forfeiture of deposit. The notice for bids shall state generally the work to be done and refer to the plans and specifications and shall call for proposals for doing the same, and furnishing the materials and all bids shall be accompanied by the cash or certified check payable to the order of the board of county commissioners for a sum not less than five per cent of the amount of the bid.

At the time and the place named, such bids shall then be opened and read and the committee of supervisors shall determine the lowest and best bidder and may let such contract to such bidder, if within the estimate, but if in their opinion all bids are too high, they may reject all of them and readvertise for bids.

If the bidder whose contract is accepted fails to enter into such contract, according to his bid, and according to plans and specifications, within ten days from the time he is notified that he is the successful bidder and to execute and file a bond, the said cash or check for the amount thereof shall be forfeited to the county for the use and benefit of that particular local improvement district.

History: En. Sec. 12, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1687, R. C. M. 1921.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

32-513. (1688) Appointment of inspector—compensation of inspector and supervisors—construction by county—lien on lands. The committee of supervisors and county surveyor together shall appoint some suitable and competent person other than such committee as an inspector of such work as it progresses, whose duty it shall be to be upon the work at all times during its progress and to inspect the performance thereof and to report to and to be under the supervision of the county surveyor and to inform said surveyor and said committee of supervisors of any departure from the plans and specifications. He shall be paid for his services as such inspector at the rate of five dollars per day for the time he is actually engaged thereon. Each member of the committee of supervisors shall be paid for his services the sum of three dollars per day for the time said committee of supervisors is actually engaged in meeting and acting with said surveyor and in transacting as a committee the business of said local improvement district until the work shall have been fully completed and accepted, and said committee shall be paid no mileage or other expense save and except the three dollars herein provided for.

That when bids for the construction and improvement of said highways are rejected by the local committee of supervisors, then it shall be lawful for the said improvement district to contract with the board of county commissioners to construct or improve said highways. The said highways in said improvement districts may be constructed and improved in the first instance at the entire expense of said county and the county may, as far as practicable, take the place of a private contractor, provided for in this act; and said county shall, when it has paid for such construction or

improvements, be recompensed for same by the local improvement district to the proportional part of said costs and expenses as shall have been agreed upon before said work was performed by said county; and, in case the said installment plan was adopted, then, and in that event, the bonds issued for said improvement district shall become the property of said county, and the lien herein provided for on the lands in said improvement district, shall be as valid and existing as if the contract had been let to a private contractor as provided in this act.

History: En. Sec. 13, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1688, R. C. M. 1921.

Collateral References

Highways \Rightarrow 112, 113.
40 C.J.S. Highways § 201.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

32-514. (1689) Apportionment of costs—assessment-roll, contents, notice and confirmation of—correction of errors. When the final order for such improvement and construction shall have been made, the committee of supervisors, together with the county assessor, shall proceed to apportion the estimated cost and expenses of said improvement and construction upon the land embraced in said improvement district, according to the benefit derived therefrom, and within thirty days from the letting of the contract, the said county assessor shall report to and file with the board of county commissioners and the county treasurer an assessment-roll in duplicate, which assessment-roll shall contain the description of each lot and parcel of land to be assessed, the amount to be charged, levied, or assessed against each lot, parcel, or piece of land, in proportion to the benefit to be derived from said improvement or construction, and the name of the owner of same, if known; but in no case shall a mistake in the name of the owner be fatal to the assessment when the description of the property is correct.

As soon as said assessment-roll shall have been so reported and filed, the county commissioners shall cause notice to be published for three consecutive weeks, which notice shall be published in the newspapers in which notice of invitations for bids for the contract was published, notifying all persons interested that such assessment-roll has been filed, and requiring them to appear at the office of said county commissioners at the county seat, at a time not less than fifteen days from the date of the last issue of said publication of said notice, and make objection thereto, if any they have. At the time fixed for objections, the county commissioners, together with the assessor of the county, shall meet, and if no objections have been filed to said assessment-roll, the commissioners shall make an order confirming the same; but if any objections in writing, properly verified, have been filed by any of the landowners affected thereby, the county commissioners shall proceed to hear such objections, and for that purpose shall hear any testimony that shall be offered by any party interested.

After such hearing the board shall make such corrections and charges, if any, which to them appear just and requisite to apportion the assessment to the benefit to be received from such improvement or construction, and said board shall then make and enter an order to approve and certify such assessment-roll, and with the aid of the county assessor shall levy and

assess the amount thereof against each and all of the lots and parcels of land or parts thereof, respectively, included in said roll as provided, and said assessment so made shall become a first lien on the land described in the assessment-roll.

History: En. Sec. 14, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1689, R. C. M. 1921.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

Collateral References

Highways 119, 132.

40 C.J.S. Highways §§ 207, 296.

Tax sale as freeing property from possibility of further assessments for benefits to land. 11 ALR 2d 1133.

Power to remit, release, or compromise assessments for public improvements. 28 ALR 2d 1425.

Superiority of special or local assessment lien over earlier private lien or mortgage, where statute creating such special lien is silent as to superiority. 75 ALR 2d 1121.

32-515. (1690) Modes of payment—payments by installment. There shall be two modes of making payment of such special assessment charged against the several tracts and parcels of land included in such local improvement district, namely, that of “immediate payment,” and that of payments in installments, and the mode of payment shall be that petitioned for by said landholders. The payment of installments shall be in six equal installments, in one, two, three, four, five, and six years, and such installment payments shall be in the form of bonds that shall draw six per cent interest per annum from the date until they are paid.

History: En. Sec. 15, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1690, R. C. M. 1921.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

Collateral References

Highways 146.

40 C.J.S. Highways § 304.

32-516. (1691) Immediate payment plan—notice to landowners—contents of notice. In case the “immediate payment” plan is adopted the county commissioners, as soon as such assessment-roll has been proved and certified, shall deliver the same to the county clerk, who shall file one of such duplicates thereof in his office, and shall immediately deliver the other of such duplicates to the county treasurer that the said treasurer may collect such assessment.

The county treasurer shall give notice by publication for two consecutive weeks in the newspapers in which the notice for bids was advertised, and shall mail copy of such notice to the owners of the property assessed, when the name of such owner and his post-office address are known, but the failure to mail such notice shall not be fatal to such assessment when publication thereof is made in said newspapers. Said notice shall state that such assessment-roll has been certified to the treasurer for collection, and that unless payment is made within thirty days from the date of such notice, such assessment will become delinquent and shall bear interest at the rate of ten per cent per annum, and if not paid before such assessment shall have become delinquent, a penalty of five per cent shall be added to the sums delinquent, as well as the interest on the annual tax roll for the current year against each lot, tract, and parcel so delinquent, and that the interest and penalty collected, as other taxes are collected, together

with such additional charges as are authorized to be charged and collected on other delinquent taxes, and that the same shall be sold for the amount of such special assessment with interest, penalty, and costs, in the manner and with the same authority as lands are sold for general taxes.

History: En. Sec. 16, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1691, R. C. M. 1921.

Collateral References

Highways↪147.
40 C.J.S. Highways § 304.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

32-517. (1692) Procedure upon adoption of installment plan—county treasurer to collect annual installments. In case the mode of payment by installment be adopted, the county commissioners and the committee of supervisors shall proceed, as nearly as may be, as in case the mode of immediate payment plan was adopted, to the approval and certifying of the assessment-roll; but the county commissioners and assessor, at the time of levying said assessment, and in their order naming such levy, shall provide and declare that the sum charged thereby against each of such tracts or parcels of land may be paid in equal annual installments, with interest upon the whole sum charged at the rate of six per cent per annum, specifying the number of such installments, which shall be equal to the number of years for which the bonds may run; and each year thereafter the county treasurer shall collect one of said installments, together with the interest due thereon and the interest on the installments thereafter to become due, in the same manner and with the same added penalty and interest in case of delinquency, and by means of the same proceedings to enforce such payment by the sale of the land as hereinbefore provided for the collection of said assessment by the method of immediate payment.

History: En. Sec. 17, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1692, R. C. M. 1921.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

32-518. (1693) County commissioners must provide method of payment. The county commissioners may, and, in all cases where improvement is ordered upon a petition, specifying the method of payment of bonds, must provide that the payment of costs and expenses of such improvement or construction be made under the provisions of this act, by bonds as charged against the property of the local improvement district, issued to the contractors in payment of the contract price, or by the proceeds of such bonds to be issued and sold as hereinafter provided.

History: En. Sec. 18, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1693, R. C. M. 1921.

Collateral References

Counties↪174.
20 C.J.S. Counties § 261.
Generally, 43 Am. Jur. 261, Public Securities and Obligations.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

32-519. (1694) Order for issuance of bonds—form and contents. The county commissioners shall make and enter an order authorizing and directing the issuance of said bonds, and the terms may be payable on same at a date not to exceed ten years from and after the date of their

issuance, and payment of which shall not be demanded by the holder thereof until said bonds become due, and they shall bear interest at the rate of six per cent per annum, payable annually, and each bond shall have attached thereto interest coupons for each interest payment. Such bonds and coupons shall bear the date of issuance and be made payable to bearers and all shall be signed by the chairman of the board of county commissioners and attested by the county clerk and the seal of such board shall be affixed to each bond but not to the coupon. Said bonds shall be in denominations of not less than one hundred dollars nor more than one thousand dollars, and they shall refer to the improvement district for which the same shall be issued and to the order and record thereof authorizing the same and that it is payable out of the local improvement funds, created by special assessment for the payment of the costs and expenses of such improvement and construction, and not otherwise, and shall bear upon its face the designation of the local improvement district "Local Improvement District No. in county, Montana." Said bonds shall not be issued in excess of the costs and expenses of the improvements and construction.

History: En. Sec. 19, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1694, R. C. M. 1921.

Collateral References

Counties ~~183~~ 183(2).

20 C.J.S. Counties § 268.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

32-520. (1695) Notice in case of payment by special bonds—contents—payment of assessment—redemption of land by payment of assessment. In case of payment by such special bonds, the county treasurer shall give notice by publication for two consecutive weeks, and shall mail a copy of such notice to the owner of the property assessed in the manner and with the same qualifications as to the giving of such notice provided in this act with regard to immediate payment, which notice shall state that such assessment-roll has been certified to him for collection, and that unless payment of the whole amount of such assessment is made within thirty days from the date of such notice, special bonds shall be issued against said property for the payment of said assessment, and thereafter the same will be payable in annual installments, with interest thereon at the rate provided for in said bonds. At any time within such thirty days, any owner of lands within such local improvement district may pay the said assessment chargeable against his said lands, and release and discharge the same therefrom, and from the operation and effect of such bonds; and no bonds shall be issued until twenty days after the expiration of such thirty days, nor for any amounts of such assessment so paid in full within such thirty days. The owner of any such lands may redeem the same from all liability for such assessment at any time after said thirty days, by paying the entire installments of said assessment remaining unpaid and charged against such lands at the time of such payment, with interest, and all charged thereon to the date of the maturity of the installment next falling due. In all cases where any assessment or any installment thereof is paid as herein provided, the same shall be paid to the county treasurer, and all

sums so paid shall be applied solely to the payment of the cost and expenses of such improvement, or to the redemption of such bonds issued therefor if paid after such bonds are issued.

History: En. Sec. 20, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1695, R. C. M. 1921.

Collateral References

Counties↯180; Highways↯146.
20 C.J.S. Counties § 262; 40 C.J.S. Highways § 304.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

32-521. (1696) Issuance of special bonds to contractor or sale of same.

The special bonds issued under the provisions of this act, or such portion thereof as may remain unsold, if the same are ordered sold by the county commissioners, may be issued to the contractor constructing the improvement in payment therefor, or the order of the board of county commissioners directing the issuance of such bonds may provide that the same may be sold by the county treasurer, in the manner prescribed in such order, at not less than their par value and accrued interest; and the proceeds of such bonds shall be applied in payment of the cost and expenses of such improvement.

History: En. Sec. 21, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1696, R. C. M. 1921.

Collateral References

Counties↯182; Highways↯113(4).
20 C.J.S. Counties § 275; 40 C.J.S. Highways § 209.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

32-522. (1697) Payment of interest on bonds—retirement of bonds.

The county treasurer shall pay the interest on the bonds authorized to be issued by this act out of the funds of the local improvement district collected on assessments on account of which said bonds are issued. Whenever there shall be sufficient money in such local improvement fund against which such bonds have been issued under the provisions of this act, over and above sufficient for the payment of interest on all unpaid bonds, to pay the principal of one or more of such bonds, he shall call in and pay such bonds in their numerical order. Such call shall be made by publication in the county official newspaper on the day following the maturity date of the installment of assessment, or as soon thereafter as practicable, and shall state that special bonds No. (giving the serial number or numbers of said bonds called) of such local improvement district will be paid on the day the next interest coupons of said bonds shall become due, and interest upon said bonds thus called shall cease upon said date.

History: En. Sec. 22, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1697, R. C. M. 1921.

Constitutionality of statutory provisions as to political corporations or divisions which shall bear cost of maintaining highways. 2 ALR 746.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

Taxation for street or highway purposes as within constitutional provisions prohibiting legislature from imposing for town, county, city or corporate purposes, or providing that legislature may invest power to levy such taxes in local authorities. 46 ALR 710.

Collateral References

Counties↯187.
20 C.J.S. Counties § 276.

32-523. (1698) **Collection of assessments by suit of owner of bonds.** If the county treasurer shall fail, neglect, or refuse to pay said bonds issued under the provisions of this act, or to collect promptly any such assessments when due, the owner of any such bonds may proceed in his own name to collect such assessments, and to foreclose the lien thereof in any court of competent jurisdiction, and shall recover, in addition to the amount of such warrants and interest thereon, five per centum, together with the costs of such suit. Any number of holders of such bonds for any single improvement district may join as plaintiffs, and any number of owners of the property on which the same are a lien may be joined as defendants in such suit. Neither the holder nor any owner of any such bond issued under the authority of this act shall have any claim therefor against the county through the instrumentality of which the same is issued, except from the special assessment made for the improvement for which such bond was issued, but his remedy in case of nonpayment shall be confined to the enforcement of such assessments. A copy of this section shall be plainly written, printed, or engraved on each bond so issued.

History: En. Sec. 23, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1698, R. C. M. 1921.

Collateral References

Highways \S 147.
40 C.J.S. Highways \S 304.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

32-524. (1699) **Auditing and payment of claims and accounts.** It shall be the duty of the county auditor, in counties where there are auditors, and in counties where there are no auditors, it shall be the duty of the county clerk, to audit all claims and accounts for services and every kind of expense payable from funds of the local improvement district, when the same shall have been first approved and certified by the committee of supervisors; and when so approved and audited, the county auditor, or county clerk, as the case may be, shall issue to the county treasurer an order in favor of the person to whom such claim or account is payable, to pay the same, and upon the presentation of such order by the person to whom it was issued, or his assignee, the county treasurer shall pay the same from the funds of such local improvement district provided for the payment of the cost and expenses of such improvement, and not otherwise. Estimates for work done under the contract for the construction and completion of such improvement shall be made by the county surveyor with the approval of the committee of supervisors, and the same shall be likewise audited by the county auditor in counties where there are auditors, or by the county clerk, as the case may be, and, when so made, approved, and audited, the same shall be likewise paid by the county treasurer upon the order of the county auditor, or clerk, to an amount, however, not exceeding eighty per centum of such estimate during the progress of the work. In case of said assessment being made payable by installments, the county treasurer shall pay such order only from such assessments as shall have been collected prior to the issue of such special local improvement bonds, and from the proceeds of the sales of such bonds after the issue thereof; but in case it has been arranged with the contractor

for the work, and ordered by the board of county commissioners, that such contractor shall receive such bonds to pay the contract price of the work, such order of the county auditor, or in counties where there are no auditors, such order of the county clerk upon such approved estimates shall call for such bonds instead of money, and shall be paid in such bonds by the county treasurer, with whom the same shall be deposited for that purpose, and in that case such bonds shall not be given a date prior to the time of their delivery to such contractor upon such order, which date shall be then written in such bonds by the county treasurer, and be deemed to be the date of their issue, from which interest shall begin to run and the time at or after which their payment may be demanded by the holder shall be computed. The amounts collected upon the installment payments of such assessments shall be reserved and disbursed by said county treasurer for the payment of the principal and interest on and for the redemption of such bonds. The proceeds from the sale of such bonds shall be disbursed by such county treasurer in payment of the cost and expenses of such construction and improvement of such county road, upon the orders of such county auditor, or in counties where there are no auditors, upon the orders of the county clerk, as hereinabove provided.

History: En. Sec. 24, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1699, R. C. M. 1921.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

Collateral References

Counties \Rightarrow 183(1), 187, 204(2); Highways \Rightarrow 113(4), 146, 149.

20 C.J.S. Counties §§ 269, 276, 307; 40 C.J.S. Highways §§ 209, 304, 305.

Amount of compensation of attorney for services as to assessment for public improvement in absence of contract or statute fixing amount. 56 ALR 2d 195.

32-525. (1700) Disposition of residue of funds. Any money remaining in the county treasury belonging to the funds of such local improvement district, after the payment of the whole cost and expense of such construction or improvement, in excess of the total sum required to defray all expenditures on account thereof, including the reimbursement of the county for any advancements, shall be refunded, on demand, to the amount of such overpayment; and if there shall be such an excess in the assessment of any person who shall not have paid his assessment in full, a rebate shall, on demand, be allowed to such person to the amount of such overassessment; provided, such demand hereinabove provided for be made within two years from the date upon which the assessment for such local improvement district became due. Any such funds remaining in the county treasury after the expiration of two years for which no demand has been made as herein provided, belonging to any local improvement district, after the payment of the whole cost and expense of such improvement, shall go into the general funds.

History: En. Sec. 25, Ch. 12 of Ch. 172, L. 1917; re-en. Sec. 1700, R. C. M. 1921.

References

State ex rel. McMaster v. District Court, 80 M 228, 231 et seq., 260 P 134.

Collateral References

Highways \Rightarrow 149.

40 C.J.S. Highways § 305.

32-526. (1701) Completed road to be deemed a main highway. When a road has been completed under the provisions of this act, it shall be deemed to be a main highway, as now defined by law, and thereafter be maintained as such in the same manner as other highways are maintained.

History: En. Sec. 26, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1701, R. C. M. 1921.

Collateral References

Highways \Rightarrow 18.

39 C.J.S. Highways § 1.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

32-527. (1702) Construction of chapter. Nothing in this act provided shall be construed as repealing or modifying any existing law for the creation, laying out, planning, construction, or improvement of any public highway, but shall be construed as an additional power and method for the improvement of county roads, and as extending to owners of rural lands an opportunity to secure better highways by charging a part of the costs thereof upon the lands especially benefited thereby, and this act shall be construed as co-operating and concurrent with the laws provided for the improvement of public highways under the laws of the state of Montana and of the United States.

History: En. Sec. 27, Ch. 12 of Ch. 172,
L. 1917; re-en. Sec. 1702, R. C. M. 1921.

References

State ex rel. McMaster v. District Court,
80 M 228, 231 et seq., 260 P 134.

CHAPTER 6

SPECIAL ROAD DISTRICTS, ABOLISHMENT

Section 32-601. Special road districts abolished.

32-602. Property of road districts transferred to county.

32-601. Special road districts abolished. All special road districts are hereby dissolved, disincorporated, and abolished.

History: En. Sec. 1, Ch. 35, L. 1939.

32-602. Property of road districts transferred to county. All property—funds or accruing funds—shall become the property of the county, and all funds shall be transferred to the county general road fund; and all legal liabilities of said special road district shall become the liability of the county.

History: En. Sec. 2, Ch. 35, L. 1939.

CHAPTER 7

PUBLIC BRIDGES

Section 32-701. County to maintain public bridges.

32-702. Bridge tax—levy and collection.

32-703. Construction or repair of bridge costing more than two hundred dollars.

32-704. Letting of contract.

32-705. Bridges in cities and towns over streams.

32-706. Suburban railway to pay county for use of bridge.

- 32-707. Duty of city or town with respect to maintenance of bridge and approaches.
- 32-708. Special tax for construction and maintenance.
- 32-709. Election to determine question of construction—bonds—special levy.
- 32-710. Construction of bridges crossing county lines.
- 32-711. Bridges to be under control and management of county commissioners—police regulations.
- 32-712. Construction of act as respects cities and towns.
- 32-713. Construction or reconstruction of bridges.
- 32-714. Expending of funds—when authorized—resolution.
- 32-715. Allotment—when made.
- 32-716. Deduction of allotment from future regular apportionments to the particular financial district.

32-701. (1703) County to maintain public bridges. All public bridges are maintained by the county at large under the management and control of the board of county commissioners; the expense of construction, maintaining, and repairing the same, are provided for in this act.

History: En. Sec. 2810, Pol. C. 1895; re-en. Sec. 75, Ch. 44, L. 1903; re-en. Sec. 1411, Rev. C. 1907; re-en. Sec. 1, Ch. 5, Ch. 72, L. 1913; re-en. Sec. 1, Ch. 5, Ch. 141, L. 1915; re-en. Sec. 1703, R. C. M. 1921. Cal. Pol. C. Sec. 2711.

References

Sjostrum v. State Highway Commission, 124 M 562, 228 P 2d 238, 240.

Collateral References

Bridges—21(1).
11 C.J.S. Bridges § 35.

32-702. (1704) Bridge tax—levy and collection. The board of county commissioners may levy a special tax not to exceed three (3) mills on the dollar of the taxable property of the county for the purpose of constructing, maintaining and repairing free public bridges; provided, however, that an additional levy for such bridge purposes may be made under conditions as follows: In counties where the total linear feet of bridges or bridge construction is in excess of four thousand (4000) feet and the taxable value of property in said county is four million dollars (\$4,000,000.00) or less, the county commissioners may, if they find such to be necessary, levy one (1) mill in addition to the three (3) mills before herein provided for; in counties where the total linear feet of bridges or bridge construction is in excess of six thousand (6000) feet and the taxable value of property in said county is not less than four million dollars (\$4,000,000.00), nor more than twelve million dollars (\$12,000,000.00), the county commissioners may, if they find such to be necessary, levy two (2) mills in addition to the three (3) mills before herein provided for; provided, however, that a free public bridge is hereby defined to mean any drainage structure located on, over or through any road or highway. Such taxes must be levied and collected in the same manner as other taxes, and the money, when collected and paid into the county treasury, must be kept as a special bridge fund, subject to the order of the board of county commissioners, to be used in the construction, maintaining and repairing at such places as said board directs; provided such additional special bridge fund herein provided for shall not be transferable to any other fund.

History: En. Sec. 2811, Pol. C. 1895; re-en. Sec. 76, Ch. 44, L. 1903; re-en. Sec. 1412, Rev. C. 1907; amd. Sec. 2, Ch. 5, Ch. 72, L. 1913; re-en. Sec. 2, Ch. 5, Ch. 141, L. 1915; re-en. Sec. 1704, R. C. M. 1921; amd. Sec. 1, Ch. 144, L. 1931; amd. Sec. 1, Ch. 144, L. 1947; amd. Sec. 1, Ch. 25, L. 1951. Cal. Pol. C. Sec. 2712.

References

State ex rel. Case v. Bolles et al., 74 M 54, 65, 238 P 586; Sjostrum v. State Highway Commission, 124 M 562, 228 P 2d 238, 240.

Collateral References

Bridges \Rightarrow 12.
11 C.J.S. Bridges § 16.

32-703. (1705) Construction or repair of bridge costing more than two hundred dollars. No bridge, the cost of construction or repairs of which exceeds two hundred dollars, shall be constructed or repaired except on the order of the board of county commissioners; and when ordered to be constructed or repaired it may be done by contract; provided, that such construction shall be done according to the standard plans and specifications adopted and established by the state highway commission, and copies of which shall be on file at all times in the office of the county clerk in each county of the state; provided, however, that whenever such plans so furnished cannot be applied, the county commissioners shall have prepared such necessary plans and specifications which shall be on file in the office of the county clerk thirty days prior to the letting of any such contract.

History: Ap. p. Sec. 2812, Pol. C. 1895; amd. Sec. 77, Ch. 44, L. 1903; re-en. Sec. 1413, Rev. C. 1907; amd. Sec. 1, Ch. 9, L. 1909; amd. Sec. 3, Ch. 5, Ch. 72, L. 1913; amd. Sec. 3, Ch. 5, Ch. 141, L. 1915; re-en. Sec. 1705, R. C. M. 1921. Cal. Pol. C. Sec. 2713.

Collateral References

Bridges \Rightarrow 20(1, 2), 21(1, 2).
11 C.J.S. Bridges §§ 19, 35.

32-704. (1706) Letting of contract. All bids must be sealed, opened at the time specified in the notices, and a contract awarded to the lowest bidder. The board of county commissioners may, however, reject any and all bids; provided, however, that if the state highway commission shall have adopted or established a standard plan and specification, the bids must be submitted upon such standard plan so adopted and established. The contract and bond for its performance must be entered into and approved by the said board, except in cases of great emergency, and by the unanimous consent of all its members. The said board may proceed at once to construct, replace, and repair any and all structures of whatever nature without notice.

History: Ap. p. Sec. 2813, Pol. C. 1895; amd. Sec. 78, Ch. 44, L. 1903; re-en. Sec. 1415, Rev. C. 1907; re-en. Sec. 5, Ch. 5, Ch. 72, L. 1913; re-en. Sec. 4, Ch. 5, Ch. 141, L. 1915; re-en. Sec. 1706, R. C. M. 1921. Cal. Pol. C. Sec. 2713.

Collateral References

25 Am. Jur. 368, Highways, §§ 52 et seq.

Personal liability of highway officers for damage to or trespass upon land in connection with construction or maintenance of highway. 90 ALR 1481.

Negligence of contractor for construction of bridge as ground of liability upon his part for injury or damage to third person occurring after completion and acceptance of the work. 13 ALR 2d 214; 58 ALR 2d 878.

32-705. (1707) Bridges in cities and towns over streams. Every bridge necessary to be constructed and maintained in any city or town as part of a main highway, in any county leading over a natural stream from one part to another of such county, shall be constructed and maintained by

the county at large, and be under the direction and control of the board of county commissioners.

History: En. Sec. 1, Ch. 63, L. 1917;
re-en. Sec. 1707, R. C. M. 1921.

Collateral References

Bridges⇒9(1), 21(2).
11 C.J.S. Bridges §§ 15, 35.

32-706. (1708) Suburban railway to pay county for use of bridge. Before any bridge referred to in the preceding section shall be used as a part of any street or suburban railway, the owner of such railway shall pay into the county treasury, for the use of the county bridge fund, such sum as the board of county commissioners shall determine, but not less than one-fourth nor more than one-half of the cost of construction of such bridge; and the owner of such railway shall also be obligated to pay such portion of the cost of maintaining such bridge, not less than one-fourth nor more than one-half, as the board of county commissioners shall determine, during such time as such bridge shall be used by said railway.

History: En. Sec. 2, Ch. 63, L. 1917;
re-en. Sec. 1708, R. C. M. 1921.

Collateral References

Street Railroads⇒31.
83 C.J.S. Street Railroads § 85.

32-707. (1709) Duty of city or town with respect to maintenance of bridge and approaches. The city or town in which any bridge referred to in the two preceding sections is situated shall be obligated to pay the whole or such part, not less than one-half, to be determined by the board of county commissioners, of the cost of planking, replanking, paving, or repaving such bridge from time to time; and such city or town shall be obligated to construct and maintain and keep in good repair the approaches to such bridge.

History: En. Sec. 3, Ch. 63, L. 1917;
re-en. Sec. 1709, R. C. M. 1921.

Collateral References

Bridges⇒21(4).
11 C.J.S. Bridges § 36.

Duty and liability of municipality as regards barriers for protection of adult pedestrians who may unintentionally deviate from street or highway into marginal or external hazards. 44 ALR 2d 633.

32-708. (1710) Special tax for construction and maintenance. The board of county commissioners may levy a special tax of not to exceed five mills on the dollar of the taxable property of the county to defray the cost of constructing and maintaining any bridge referred to in the preceding section.

History: En. Sec. 4, Ch. 63, L. 1917;
re-en. Sec. 1710, R. C. M. 1921.

32-709. (1711) Election to determine question of construction—bonds—special levy. Before the construction of any bridge referred to in the preceding section, the cost of which shall exceed ten thousand dollars, shall be undertaken, the board of county commissioners shall submit to the qualified electors of a county, at a general or special election, the question of whether such bridge shall be constructed, and the cost thereof paid by the county; and if the electors at such election shall vote in favor of the construction of such bridge, the board of county commissioners may, if they deem it necessary and advisable to do so, issue and sell the bonds of

said county to the amount authorized for the purpose of constructing such bridge, under such regulations as other bonds of the county are issued and sold, and with such funds construct said bridge; or, if the cost of such bridge shall not exceed the amount authorized to be raised by a special levy, a special levy may be made for the purpose of raising the moneys necessary to defray the cost of constructing such bridge, as provided in the preceding section.

History: En. Sec. 5, Ch. 63, L. 1917;
re-en. Sec. 1711, R. C. M. 1921.

Collateral References

Bridges⊃12; Counties⊃151, 174.
11 C.J.S. Bridges § 16; 20 C.J.S. Counties §§ 226, 261.

32-710. (1712) Construction of bridges crossing county lines. Bridges crossing the line between counties must be constructed by the counties into which said bridges reach, and each of the counties must pay such portion of the cost as has been previously agreed upon by the board of county commissioners of the respective counties.

History: En. Sec. 2814, Pol. C. 1895;
re-en. Sec. 79, Ch. 44, L. 1903; re-en. Sec.
1415, Rev. C. 1907; re-en. Sec. 5, Ch. 5, Ch.
72, L. 1913; re-en. Sec. 5, Ch. 5, Ch. 141,
L. 1915; re-en. Sec. 1712, R. C. M. 1921.

References

Sjostrum v. State Highway Commission,
124 M 562, 228 P 2d 238, 240.

Collateral References

Bridges⊃10(2).
11 C.J.S. Bridges § 17.

32-711. (1713) Bridges to be under control and management of county commissioners—police regulations. All bridges referred to in the foregoing sections shall be under the management and control of the board of county commissioners of the county in which such bridge is situated, and all repairs to and planking and replanking, paving, and repaving thereof shall be done as and when directed by the board of county commissioners; provided, that such bridges and all persons thereon shall be subject to the reasonable police regulations of the city or town in which any such bridge is situated.

History: En. Sec. 6, Ch. 63, L. 1917;
re-en. Sec. 1713, R. C. M. 1921.

Collateral References

Bridges⊃21(1).
11 C.J.S. Bridges § 35.

32-712. (1714) Construction of act as respects cities and towns. Nothing in this act contained shall be deemed to deprive cities or towns of any of the powers conferred upon them by existing laws in respect to the construction and maintenance of bridges within their corporate limits, and any such city or town is hereby empowered to exercise such powers in aid of the construction or maintenance of any bridge referred to in this act, situated in any such city or town, to any extent the corporate authorities of such city or town may deem necessary or just.

History: En. Sec. 7, Ch. 63, L. 1917;
re-en. Sec. 1714, R. C. M. 1921.

Collateral References

Bridges⊃5.
11 C.J.S. Bridges § 8.

32-713. Construction or reconstruction of bridges. The state highway commission is hereby authorized to allocate from available state construc-

tion moneys for the federal aid highway system a sum of one million dollars (\$1,000,000.00), or so much thereof as may be necessary, in any fiscal year for the construction or reconstruction of any major bridge or bridges on the state primary or secondary highway system when the construction or reconstruction of any such bridge or bridges would prohibit or seriously delay the orderly and necessary highway construction program in the financial districts if regularly apportioned funds were used.

History: En. Sec. 1, Ch. 106, L. 1955;
amd. Sec. 1, Ch. 35, L. 1957.

Collateral References

Bridges—10.

11 C.J.S. Bridges § 16.

8 Am. Jur. 928, Bridges § 27.

32-714. Expending of funds—when authorized—resolution. The allotment of funds under this act may be expended by the state highway commission on primary bridges where the engineer's estimate of cost of construction or reconstruction is in excess of the sum of five hundred thousand dollars (\$500,000.00), and on secondary bridges where the engineer's estimate of cost of construction or reconstruction is in excess of the total estimated future regular apportionment of state construction moneys to the federal aid secondary system to the county or counties for a period of three (3) years, but only when the state highway commission by resolution, as part of its finding of public necessity, declares that a bridge should be constructed or reconstructed on a designated portion of the state primary or secondary highway.

History: En. Sec. 2, Ch. 106, L. 1955;
amd. Sec. 2, Ch. 35, L. 1957.

32-715. Allotment—when made. The allotment of such funds shall be made from available state construction moneys before apportionment to the financial district in accordance with section 84-1817.

History: En. Sec. 3, Ch. 106, L. 1955.

32-716. Deduction of allotment from future regular apportionments to the particular financial district. (a) The expenditure of moneys on the construction or reconstruction of primary bridges in any financial district from such allotment shall be deducted in equal installments from the future regular apportionments to that financial district over a period of not to exceed five (5) years, the first deduction commencing in the next fiscal year following the year in which the expenditure was made.

(b) The expenditure of moneys on the construction or reconstruction of secondary bridges from such allotment shall be deducted in equal installments from the future regular apportionments to the financial district pursuant to the provisions of section 84-1817 (3), over a period not to exceed ten (10) years, the first deduction commencing in the next fiscal year following the year in which the expenditure was made.

History: En. Sec. 4, Ch. 106, L. 1955;
amd. Sec. 3, Ch. 35, L. 1957.

CHAPTER 8

GUIDEBOARDS

(Repealed—Section 158, Chapter 263, Laws of 1955)

32-801 to 32-806. (1715 to 1720) Repealed.**Repeal**

These sections (Secs. 1 to 3 of Ch. 7 of Ch. 141, L. 1915; Secs. 1 to 3, Ch. 142,

L. 1921), relating to signboards along highways, were repealed by Sec. 158, Ch. 263, Laws 1955, effective July 1, 1955.

CHAPTER 9

CORRUGATED IRON CULVERTS

Section 32-901. Corrugated iron culverts—sale to state or municipal corporations—analysis.

32-902. Penalty for failure to file analysis.

32-903. Analyses to be kept by secretary of state.

32-904. Penalty for delivering inferior corrugated culverts.

32-905. Duty of county attorneys to prosecute.

32-901. (1721) Corrugated iron culverts—sale to state or municipal corporations—analysis. No bid or proposal for the sale of corrugated culverts to any county, city, town, municipal or other public corporation, or to the state of Montana, or any department, board, bureau, commission or officer thereof shall be valid, and no contract for the purchase of corrugated culverts by any county, city, town, municipal or other public corporation, or by the state of Montana, or any department, board, bureau, commission or officer thereof, shall be entered into, unless there shall have been filed by such bidder or seller with the secretary of state, prior to the making of such bid or the letting of such contract, as the case may be, an accurate and complete analysis of the metal used in the manufacture of such corrugated culverts, showing the percentage each of pure iron, copper, carbon, silicon, manganese, sulphur, phosphorus and other substances contained therein, together with the weight of galvanizing per square foot, sworn to by the manufacturer of such metal, and a copy of such affidavit, together with a specification showing gauge of the metal used in the various diameters of such culvert, the number, size and spacing of the rivets and fastenings, and the length of lap of the longitudinal and circumferential seams, and the type of connection to be furnished for connecting together the various sections of such corrugated culverts, signed by the seller thereof, or bidder, as the case may be, shall be incorporated in such bid or in such contract, as the case may be.

History: En. Sec. 1, Ch. 143, L. 1919;
re-en. Sec. 1721, R. C. M. 1921.

Collateral References

Highways 113(3).
40 C.J.S. Highways § 208.

32-902. (1722) Penalty for failure to file analysis. The failure to file such analysis with the secretary of state, or the failure to incorporate such copy, together with such specification, shall render such bid or contract null, void, and of no effect, and no warrant or order for the payment of any public moneys for the purchase of corrugated culverts shall be valid unless the provisions of this act shall have been fully complied with.

History: En. Sec. 2, Ch. 143, L. 1919;
re-en. Sec. 1722, R. C. M. 1921.

32-903. (1723) Analyses to be kept by secretary of state. It shall be the duty of the secretary of state to file all such sworn analyses and keep a complete index thereof, and they shall thereupon become public records.

History: En. Sec. 3, Ch. 143, L. 1919;
re-en. Sec. 1723, R. C. M. 1921.

32-904. (1724) Penalty for delivering inferior corrugated culverts. Any person, firm or corporation who, as principal or agent, shall intentionally sell or deliver for sale to any county, city, town, municipal or other public corporation, or the state of Montana, or any department, board, bureau, commission or officer thereof, any corrugated culvert which is inferior in grade, quality, weight, character, kind or brand to that specified in his bid, analysis, specification or contract, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than five hundred dollars, or greater than one thousand dollars, or by imprisonment in the county jail for not more than thirty days, or by both such fine and imprisonment; and upon a second conviction for such offense he shall be punished by a fine of not less than one thousand dollars, or more than fifteen hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than sixty days, or by both such fine and imprisonment.

History: En. Sec. 4, Ch. 143, L. 1919;
re-en. Sec. 1724, R. C. M. 1921.

Collateral References

Highways 113(4).
40 C.J.S. Highways § 211.

32-905. (1725) Duty of county attorneys to prosecute. It shall be the duty of the county attorneys in this state to diligently prosecute any and all persons violating any of the provisions of, and otherwise to enforce, this act in their respective places (counties or districts) upon complaint of any citizen or taxpayer of any violation of this act.

History: En. Sec. 5, Ch. 143, L. 1919;
re-en. Sec. 1725, R. C. M. 1921.

Collateral References

District and Prosecuting Attorneys 8.
27 C.J.S. District and Prosecuting Attorneys § 14.

CHAPTER 10

OBSTRUCTIONS AND ENCROACHMENTS

- Section 32-1001. Construction of sidewalks—damage to sidewalk by team.
32-1002. Fences and buildings encroaching upon highway.
32-1003. Notice to remove encroachment.
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32-1014. Dumping garbage or other debris or refuse upon or near highway or public recreational property.

- 32-1015. Repealed.
- 32-1016. Prosecution of offenses by county attorney.
- 32-1017. Repealed.
- 32-1018. Grazing livestock on highway unlawful.
- 32-1019. Exclusions from preceding section.
- 32-1020. Penalty for violating act.

32-1001. (1726) Construction of sidewalks—damage to sidewalk by team. Any owner or occupant of land may construct a sidewalk on the highway along the line of his land, subject, however, to the authority conferred by law on the board of county commissioners, and the road supervisors; and any person using said sidewalk with mule, horse, or team, without permission of the owner, is liable to such owner or occupant in the sum of five dollars for each trespass, and for all damages suffered thereby.

History: En. Sec. 2621, Pol. C. 1895; re-en. Sec. 7, Ch. 44, L. 1903; re-en. Sec. 1343, Rev. C. 1907; re-en. Sec. 1, Ch. 6, Ch. 72, L. 1913; re-en. Sec. 1, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1726, R. C. M. 1921.

Cross-Reference

Construction of telegraph, telephone and electric lines along highway, sec. 70-301.

Collateral References

Highways⇒86.
39 C.J.S. Highways § 141.

32-1002. (1727) Fences and buildings encroaching upon highway. If any highway duly laid out or erected is encroached upon by fences, buildings, or otherwise, the road supervisor of the district must give notices, orally or in writing, requiring the encroachment to be removed from the highway.

History: En. Sec. 2, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1727, R. C. M. 1921. Cal. Pol. C. Sec. 2731. See also history Sec. 32-1001.

Collateral References

Highways⇒157.
40 C.J.S. Highways § 224.

Right of one whose access by means of a right of way or branch road to a highway is interfered with by an obstruction in the latter. 5 ALR 200.

Contractor's right as to barricading or obstructing street. 7 ALR 1203.

Liability for injury due to signal guidepost or "silent policeman" in street. 12 ALR 333.

Monument or marker in highway. 16 ALR 927.

Employment of independent contractor as affecting liability for impeding public in use of highways. 23 ALR 1008.

Liability because of conditions which obstruct view at intersection of highways. 42 ALR 573.

Overhead wires across street or highway as nuisance. 54 ALR 483.

Power of highway officer in respect of billboards or other conditions on adjoining property which are deemed dangerous to travel or offensive esthetically to travelers. 81 ALR 1547.

Personal liability of highway officers for damage to or trespass upon land in connection with construction or maintenance of highways. 90 ALR 1481.

Liability of governmental unit for injury to traveler from collision with privately owned pole standing within highway boundaries. 3 ALR 2d 6.

Liability for injury from door swinging into street or sidewalk. 16 ALR 2d 1172.

Liability for injury to or death of child resulting from wooden poles piled or stacked on public way. 28 ALR 2d 239.

Liability of municipality for injuries occasioned by falling of awning or the like. 34 ALR 2d 494.

Contributory negligence of driver of car striking object or obstruction in road where his vision is obscured by smoke, dust, atmospheric condition, or unclean windshield. 42 ALR 2d 13.

Liability for personal injury to one colliding with or falling over scale or other machine dispensing merchandise or services on public sidewalk. 65 ALR 2d 965.

Municipality's power to permit private owner to construct building or structure overhanging or crossing the air space above public street or sidewalk. 76 ALR 2d 896.

32-1003. (1728) Notice to remove encroachment. Notice must be given to the occupant or owner of the land or person causing or owning the

encroachment or left at his place of residence, if he be known to the person giving such notice and resides in the county; if not, it must be posted on the encroachment, specifying the breadth of the highway, the place and extent of the encroachment, and requiring him to remove the same forthwith.

History: En. Sec. 3, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1728, R. C. M. 1921. Cal. Pol. C. Sec. 2732. See also history Sec. 32-1001.

Collateral References

Highways 157.
40 C.J.S. Highways § 224.

32-1004. (1729) Penalty for failure to remove encroachment promptly.

If the encroachment is not removed forthwith, or commenced to be removed forthwith, and the removal is not diligently prosecuted, the one who caused, owns, or controls the encroachment forfeits ten dollars for each day the same continues unremoved. If the encroachment is such as to effectually obstruct and prevent the use of the highway for vehicles, the road supervisor must forthwith remove the same.

History: En. Sec. 4, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1729, R. C. M. 1921. Cal. Pol. C. Sec. 2733. See also history Sec. 32-1001.

Collateral References

Highways 161.
40 C.J.S. Highways § 229.
25 Am. Jur. 622, Highways, § 326.

32-1005. (1730) Action to remove or abate—costs and damages. If the encroachment is denied, and the owner, occupant, or person controlling the matter or thing charged with being an encroachment, refuses either to remove or permit the removal thereof, the road supervisor must commence in the proper court an action to abate the same as a nuisance; and if he recovers judgment, he may, in addition to having the same abated, recover ten dollars for every day such nuisance remained after such notice, and also his costs in said action. The board of county commissioners may at any time order the supervisor to forthwith remove any encroachment without commencing an action.

History: En. Sec. 5, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1730, R. C. M. 1921. Cal. Pol. C. Sec. 2734. See also history Sec. 32-1001.

Collateral References

Highways 158.
40 C.J.S. Highways § 225.

32-1006. (1731) Removal of encroachment at expense of owner. If this encroachment is not denied, but is not removed for five days after the notice is complete, the road supervisor may remove the same at the expense of the owner, occupant, or person controlling the same, and recover his costs and expenses, and also, for each day the same remained after notice was complete, the sum of ten dollars in an action for that purpose.

History: En. Sec. 6, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1731, R. C. M. 1921. Cal. Pol. C. Sec. 2735. See also history Sec. 32-1001.

32-1007. (1732) Liability for permitting water to overflow highway. Any person storing or distributing water for any purpose, who permits the water to overflow any highway to the injury thereof, must, upon notification by the board of county commissioners, or the road supervisor of the district where such overflow occurred, repair the damages occasioned by overflow; and should such repairs not be made within a reasonable time

by such person, the road supervisors must make such repairs and recover the expense thereof from such person in an action at law.

History: En. Sec. 7, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1732, R. C. M. 1921. Cal. Pol. C. Sec. 2737. See also history Sec. 32-1001.

Collateral References

Waters and Water Courses \Rightarrow 119(5).
93 C.J.S. Waters § 153.

NOTE.—Related sections: 32-1013, 94-3565.

32-1008. (1733) Excavations across highway—permit and bridges. All persons contemplating the excavation of irrigating, mining, drainage, or other ditches across the public highways, are required to obtain a permit in writing from the board of county commissioners, or the supervisor of said district, before beginning such excavations, and to bridge such irrigation, mining, drainage, or other ditches at once, substantially and in accordance with the plans and specifications furnished by the board of county commissioners; and thereafter said bridges shall be maintained by the county. And on failure or neglect to bridge as in this section provided, the supervisor of the road district must immediately remove any obstruction placed there, and refill such ditch, if necessary for the convenience of the traveling public.

History: En. Sec. 8, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1733, R. C. M. 1921. Cal. Pol. C. Sec. 2737. See also history Sec. 32-1001.

Collateral References

Highways \Rightarrow 153.
40 C.J.S. Highways § 218.

32-1009. (1734) Duty of person finding obstruction upon highway. It shall be the duty of any person finding any obstruction upon any highway of this state to forthwith notify the road supervisor of such obstruction.

History: En. Sec. 9, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1734, R. C. M. 1921. See also history Sec. 32-1001.

32-1010. (1735) Removal of tree falling upon highway. Whoever cuts down a tree so that it falls into any highway must forthwith remove the same, and is liable to a penalty of ten dollars for every day the same remains in such highway.

History: En. Sec. 10, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1735, R. C. M. 1921. Cal. Pol. C. Sec. 2740. See also history Sec. 32-1001.

Collateral References

Highways \Rightarrow 161.
40 C.J.S. Highways § 229.

Liability of owner or occupant of abutting property for damage caused by fall of tree into highway. 11 ALR 2d 626.

Liability of municipality for damage caused by fall of tree or limb. 14 ALR 2d 186.

32-1011. (1736) Repealed—Chapter 263, Laws of 1955.

Repeal

This section (Sec. 11 of Ch. 6 of Ch. 141, L. 1915), relating to a speed limit and

the posting of such limit on bridges, was repealed by Sec. 158, Ch. 263, Laws 1955, effective July 1, 1955.

32-1012. (1737) Malicious injury to shade or ornamental trees. Whoever digs up, cuts down, or otherwise maliciously injures or destroys any shade or ornamental tree on any highway, unless the same is deemed an

obstruction by the board of county commissioners and removed under their direction, forfeits one hundred dollars for each tree.

History: En. Sec. 12, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1737, R. C. M. 1921. Cal. Pol. C. Sec. 2742. See also history Sec. 32-1001.

Cross-Reference

Injuring trees on highways, treble damages, sec. 93-6103.

32-1013. (1738) Penalty for obstructing or injuring highway—notice to county attorney. Whoever obstructs or injures, or causes to be obstructed or injured, any highway, or diverts or causes to be diverted any water-courses thereon, or drains or causes to be drained any water from his land upon any highway, to the injury thereof, is liable to a penalty of ten dollars for each day such obstruction or injury remains, and must be punished as provided in section 94-3201. It shall be the duty of the road supervisor to notify the county attorney of any and all violations of this act.

History: En. Sec. 13, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1738, R. C. M. 1921. See also history Sec. 32-1001.

NOTE.—Related sections: 32-1007, 94-3565.

References

Cited or applied as section 2726, Polit-

ical Code, before amendment, in *State v. Auchard*, 22 M 14, 55 P 361.

Collateral References

Highways↔161.

40 C.J.S. Highways § 229.

25 Am. Jur., Highways, p. 565, §§ 272 et seq.; p. 622, § 326.

32-1014. (1739) Dumping garbage or other debris or refuse upon or near highway or public recreational property. It shall be unlawful for any person or persons to dump or leave any garbage, dead animal or other debris or refuse in or upon any public highway, road, street or alley of this state, or in or upon any public recreational property, highway, street, or alley under the control of the state of Montana or any political subdivision thereof, or any officer or agent or department thereof, or within two hundred yards of such public highway, road, street, or alley or public recreational property. Any person found guilty of a violation of this section shall be fined in the sum not exceeding twenty-five dollars, or imprisoned in the county jail for a period not exceeding thirty days, or be punished by both such fine and imprisonment, in the discretion of the court. The provisions of this section shall be enforced by all highway patrolmen, sheriffs, policemen, and all other enforcement agencies and officers of the state of Montana; provided, however, that game wardens shall have the right to enforce the provisions of this section in public recreational property.

History: En. Sec. 90, Ch. 44, L. 1903; re-en. Sec. 1434, Rev. C. 1907; re-en. Sec. 14, Ch. 6, Ch. 72, L. 1913; re-en. Sec. 14, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1739, R. C. M. 1921; amd. Sec. 1, Ch. 237, L. 1959. Cal. Pol. C. Sec. 2737.

NOTE.—Related sections: 69-712, 69-1309, 94-3542.

Collateral References

Highways↔163(1).

40 C.J.S. Highways § 230.

32-1015. (1740) Repealed—Chapter 263, Laws of 1955.

Repeal

This section (Sec. 15 of Ch. 6 of Ch. 72, L. 1913; Sec. 15 of Ch. 6 of Ch. 141, L. 1915), relating to the depositing of

dangerous articles on the highways, was repealed by Sec. 158, Ch. 263, Laws 1955, effective July 1, 1955. For new provision see Sec. 32-21-111.

32-1016. (1741) Prosecution of offenses by county attorney. The county attorneys, upon complaint of the road supervisor or any other person, must prosecute all actions under the provisions of this act by a suit in the name of the state, and all penalties and forfeitures must be paid into the general fund of the county.

History: En. Sec. 2734, Pol. C. 1895; re-en. Sec. 50, Ch. 44, L. 1903; re-en. Sec. 1386, Rev. C. 1907; re-en. Sec. 16, Ch. 6, Ch. 72, L. 1913; re-en. Sec. 16, Ch. 6, Ch. 141, L. 1915; re-en. Sec. 1741, R. C. M. 1921. Cal. Pol. C. Sec. 2743.

Collateral References
District and Prosecuting Attorneys ⇨ 8.
27 C.J.S. District and Prosecuting Attorneys § 14.

32-1017. (1741.1) Repealed—Chapter 263, Laws of 1955.

Repeal

This section (Sec. 1, Ch. 74, L. 1929), relating to a penalty for the defacing of

signs or barriers on roads closed to traffic, was repealed by Sec. 158, Ch. 263, Laws 1955, effective July 1, 1955.

32-1018. Grazing livestock on highway unlawful. No person who owns or is entitled to the possession of any livestock, shall willfully permit any such livestock to graze, remain upon or occupy any part of the right of way of any state highway running through cultivated areas, or any part of the fenced right of way of any state highway, which in either case has been designated by agreement between the state highway commission and the secretary of commerce as a part of the national system of interstate and defense highways; or any state highway, designated by agreement between the state highway commission and the secretary of commerce as a part of the federal-aid primary system except as hereinafter provided.

History: En. Sec. 1, Ch. 95, L. 1951; amd. Sec. 1, Ch. 186, L. 1961.

32-1019. Exclusions from preceding section. This act shall not apply, as follows:

- (1) To livestock on state highways in charge of one or more herders.
- (2) To such parts of fenced highways adjacent to open range where no highway device has been installed to exclude range livestock therefrom.
- (3) To such parts of any state highway, a part of the federal-aid primary system, as the state highway commission may designate as being impracticable to exclude livestock. Such portions of the highway shall be marked by proper signs in accordance with the state highway commission's manual and specifications for a uniform system of traffic-control devices.

History: En. Sec. 2, Ch. 95, L. 1951; amd. Sec. 2, Ch. 186, L. 1961.

32-1020. Penalty for violating act. Any person violating the terms of this act shall be guilty of a misdemeanor and upon conviction shall be subject to a fine of not less than five dollars (\$5.00), nor more than one hundred dollars (\$100.00), for each offense. In any civil action brought by the owner, driver or occupant of a motor vehicle, or by their personal representatives or assigns, or by the owner of livestock, for damages caused by collision between any motor vehicle and any domestic animal or animals on a highway, there is no presumption or inference that such collision was

due to negligence on the part of the owner or the person in possession of such livestock, or the driver or owner of the vehicle.

History: En. Sec. 3, Ch. 95, L. 1951;
amd. Sec. 3, Ch. 186, L. 1961.

CHAPTER 11

SPEED AND TRAFFIC REGULATIONS

Section 32-1101 to 32-1109. Repealed.

- 32-1110. Licensee as prima facie owner of vehicle.
- 32-1111. Repealed.
- 32-1112. Liability of owner for negligence of driver.
- 32-1113. Owner or operator of vehicle released from responsibility for injuries of guest, when.
- 32-1114. Assumption of risk by guest in motor vehicle, when.
- 32-1115. Imputation of ordinary negligence to guest.
- 32-1116. Act not applicable to common carriers or demonstrators.
- 32-1117. Regulation of sale and use of sleighs.
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- 32-1119. Moving heavy machinery or loads.
- 32-1120. Moving steam engines and the like along highways.
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- 32-1122. Regulation of size and weight of vehicles on public highways.
- 32-1123. Standards of maximum dimensions, weights, etc.
- 32-1124. Violation of act a misdemeanor.
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- 32-1126. Officers may weigh vehicles and require removal of excessive loads—badges and uniforms of highway employees.
- 32-1127. Permits for excess size and weight.
- 32-1128. When state or local road authorities may restrict right to use highways.
- 32-1129. Restrictions as to tire equipment.
- 32-1130. Penalties for misdemeanor.
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- 32-1132 to 32-1142. Repealed.
- 32-1143. Use of white colored canes restricted to blind.
- 32-1144. Duty of pedestrian or driver approaching blind person carrying white cane.
- 32-1145. Canes—regulation of carrying—penalty.
- 32-1146. Repealed.

32-1101 to 32-1109. (1742 to 1746.3) Repealed—Chapter 263, Laws of 1955.

Repeal

These sections (Secs. 81 to 83, Ch. 44, L. 1903; Secs. 1 to 3, Ch. 8 of Ch. 72, L. 1913; Secs. 1 to 3, Ch. 8 of Ch. 141, L. 1915; Secs. 7, 8, Ch. 75, L. 1917; Sec. 1, Ch. 80, L. 1927; Secs. 1, 3, 4, Ch. 166, L. 1929; Sec. 1, Ch. 33, L. 1933; Secs. 1, 2,

Ch. 198, L. 1943; Sec. 1, Ch. 70, L. 1949), relating to speed limits, rules of the road, railroad crossing stops, and drunken driving, were repealed by Sec. 158, Ch. 263, Laws 1955, effective July 1, 1955.

32-1110. (1746.4) Licensee as prima facie owner of vehicle. Licensee of motor vehicle shall prima facie be deemed owner thereof. For the purpose of this act the person appearing on the public records as licensee of or any motor vehicle shall prima facie be deemed the owner thereof.

History: En. Sec. 5, Ch. 166, L. 1929.

Collateral References

Automobiles⇒332.
61 C.J.S. Motor Vehicles § 625.

32-1111. (1747) Repealed—Chapter 263, Laws of 1955.**Repeal**

This section (Sec. 84, Ch. 44, L. 1903; Sec. 4, Ch. 8 of Ch. 72, L. 1913; Sec. 4, Ch. 8 of Ch. 141, L. 1915), relating to

the duty of drivers to guard against runaway horses, was repealed by Sec. 158, Ch. 263, Laws 1955, effective July 1, 1955.

32-1112. (1748) Liability of owner for negligence of driver. The owner of every vehicle running or traveling upon any highway or road for the conveyance of passengers is liable for all damage to person or property done by any person in his employment as a driver while driving such vehicle, whether done willfully or negligently, or otherwise, in the same manner as such driver would be liable.

History: En. Sec. 5, Ch. 8, Ch. 72, L. 1913; re-en. Sec. 5, Ch. 8, Ch. 141, L. 1915; re-en. Sec. 1748, R. C. M. 1921. Cal. Pol. C. Sec. 2936.

Liability for Acts of Employee

Under this section, the owner of a vehicle employed for the conveyance of passengers is liable for all damages done by a driver in his employ to person or property while acting within the scope of his

employment. *Rohan v. Sherman & Reed et al.*, 61 M 519, 523, 202 P 749.

References

State v. Pepper, 70 M 596, 600, 226 P 1108; *Barney v. Board of Railroad Commrs.*, 93 M 115, 128, 17 P 2d 82.

Collateral References

Automobiles Ⓒ193(1-17).
60 C.J.S. Motor Vehicles § 435.

32-1113. (1748.1) Owner or operator of vehicle released from responsibility for injuries of guest, when. The owner or operator of a motor vehicle shall not be liable for any damages or injuries to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire, nor for any damages to such passenger's or person's parent or guardian, unless damage or injury is caused directly and proximately by the grossly negligent and reckless operation by him of such motor vehicle.

History: En. Sec. 1, Ch. 195, L. 1931.

Burden of Proof

In automobile guests' action against their driver for injuries sustained in a collision, the burden was on the guests to show the driver's gross negligence or reckless operation of the automobile because, as guests, they assumed the ordinary negligence of the driver. *Westergard v. Peterson*, 117 M 550, 552, 159 P 2d 518.

Cause of Injury

Under this and other sections of the automobile guest act, before a guest of a motorist can recover for injuries sustained while riding in his host's car, he must prove that they were caused directly and proximately by defendant's grossly negligent and reckless operation of the car, either alone or in concurrence with the wrongful acts of another. *Cowden et al. v. Crippen*, 101 M 187, 201, 53 P 2d 98.

Circumstantial Evidence

Under the rule that facts constituting negligence may be established by circumstantial evidence if such evidence tends more strongly to establish plaintiff's theory than an inconsistent one, held, in an action brought under the automobile

guest law to recover damages for death of two passengers where there was no direct evidence other than that driver without reason turned toward the left at angle of 45 degrees thus hitting a tree, court did not err in submitting the issues as to gross negligence and reckless operation to jury. *Doheny v. Coverdale*, 104 M 534, 546, 68 P 2d 142.

Contributory Negligence

A gratuitous passenger should not be held guilty of contributory negligence unless he in some way actively participated in the negligence of the driver, or was aware of the latter's incompetence or carelessness, or, knowing that the driver was not taking proper precautions while approaching a place of danger, failed to warn or admonish him. *Baatz v. Noble*, 105 M 59, 68, 69 P 2d 579.

A guest passenger could not be expected to anticipate negligence on the part of the driver and it was error to instruct the jury that the plaintiff guest passenger was bound to show that he exercised his intelligence to discover and avoid the danger which he alleged was brought about by the negligence of the defendant. *Richeson v. Toney*, — M —, 348 P 2d 803.

Curves in Road

Where, in an action for damages for the death of a guest of the driver of an automobile occurring at a railway crossing in the dark hours of a winter morning, evidence showed, *inter alia*, that the driver was proceeding on an oiled road at a speed of from 35 to 40 miles an hour and approaching a sharp curve just before reaching the crossing; the driver according to his own statement "knew the road like a book"; a number of warning signs along the highway were clearly visible for a considerable distance but the driver did not slacken his speed until he had rounded the curve, when he felt the car skid on the ice with the result that the car was overturned on the crossing and struck by a train, the trial court did not err in denying a motion for nonsuit and in permitting the jury to pass upon the question whether the driver was grossly negligent. *Nangle v. Northern Pacific Ry. Co. et al.*, 96 M 512, 520, 32 P 2d 11.

Exceeding Ordinary Negligence

Irrespective of the meaning attributable to the terms "grossly negligent" or "reckless operation" of an automobile within the meaning of this act, where the conduct of the driver resulting in injury to his guest was something more than ordinary negligence, i. e., absence of ordinary and reasonable care—liability attaches. *Nangle v. Northern Pacific Ry. Co. et al.*, 96 M 512, 520, 32 P 2d 11.

Excessive Speed

In automobile guests' action against the driver of an automobile in which they were riding for injuries sustained in colliding with an overtaken vehicle, evidence of such driver's gross negligence in driving at an excessive speed was sufficient for the jury. *Westergard v. Peterson*, 117 M 550, 552, 159 P 2d 518.

Jury Question

If the record contains substantial evidence tending to prove that the injuries complained of were caused directly and proximately by the gross negligence and reckless operation of the car by the defendant, submission of the case to the jury on the issue of defendant's gross negligence is justified. *Baatz v. Noble*, 105 M 59, 67, 69 P 2d 579.

Overtaking Another Vehicle

Where driver after several attempts to pass a truck which wouldn't give him the right of way, drove his car on the soft shoulder and overturned, the question of gross negligence or reckless operation was for the jury. *Blinn v. Hatton*, 112 M 219, 221, 114 P 2d 518.

Payments on Expense by Passenger

In action by occupant of automobile for injuries sustained in Montana where plaintiff's own evidence showed she had accepted an invitation to make trip with husband and wife, and subsequently she had agreed to pay \$1.50 a day as her part of expenses, and there was no evidence as to the actual cost of meals and lodging, or that any part of sum to be paid was to be applied to cost of gas and oil or that there would be any overplus to be so applied, plaintiff was a "guest" and refusal to so instruct jury on appropriate degree of care was reversible error, and alleged gross negligence of hosts and contributory negligence of guest were for jury. *Copp v. Van Hise*, 119 F 2d 691, 694.

Volunteer Passenger

Where the owner of a truck and his passengers were engaged in a rescue mission during a flood, and the owner was not paid anything nor was he getting any personal benefit, a passenger who went on the mission of his own accord was a "guest" within the meaning of the statutes. *Watkins v. Williamson*, 132 M 46, 314 P 2d 872, 875.

References

McNair v. Berger, 92 M 441, 454, 15 P 2d 834; *Doheny v. Coverdale*, 104 M 534, 548, 68 P 2d 142.

Collateral References

Automobiles ⇨ 181(1).
60 C.J.S. *Motor Vehicles* § 399.
5 Am. Jur. 632, *Automobiles*, §§ 237-243.

Liability of owner or operator of automobile for injury to guest. 20 ALR 1014.

What constitutes gross negligence or the like, within statute limiting liability of owner or operator of automobile for injury to guest. 74 ALR 1198.

Who is a guest within contemplation of statute regarding liability of owner or operator of motor vehicle for injury to guest. 82 ALR 1365.

Member of family riding in car driven by another member as within guest statute. 2 ALR 2d 932.

Liability under guest statute to automobile guest injured by falling from or through door of moving automobile, where claim of gross negligence, willfulness or wantonness is made. 9 ALR 2d 1343.

Payments or contributions by or on behalf of automobile rider as affecting his status as guest. 10 ALR 2d 1351.

Guest's knowledge that automobile driver has been drinking as precluding recovery, under guest statutes or equivalent common-law rule. 15 ALR 2d 1165.

Infant as guest within automobile guest statutes. 16 ALR 2d 1304.

Driving motor vehicle without lights or with improper lights as gross negligence or the like warranting recovery by guest statute or similar common-law rule. 21 ALR 2d 209.

Protest by guest against driver's manner of operation of motor vehicle as terminating host-guest relationship. 25 ALR 2d 1448.

Physical defect, illness, drowsiness, or falling asleep of motor vehicle operator as affecting liability for injury under guest statutes. 28 ALR 2d 33.

Application of guest statute in action for injury incident to towing automobile. 30 ALR 2d 1095.

Extension of hand, arm, or other portion of body from motor vehicle by guest as contributory negligence. 40 ALR 2d 246.

Automobile operator's inexperience or lack of skill as affecting his liability to passenger. 43 ALR 2d 1155.

Contributory negligence, assumption of risk, or related defenses as available in action based on automobile guest statute or similar common-law rule. 44 ALR 2d 1342.

Domestic servant as guest of employer under automobile guest statute. 49 ALR 2d 341.

Liability of vehicle driver for running over or hitting former passenger or guest who has alighted. 50 ALR 2d 974.

Liability of motor vehicle owner or operator for personal injury or death of passenger or guest occasioned by inhalation of gases or fumes from exhaust. 56 ALR 2d 1099.

Mutual business or commercial objects or benefits as affecting status of rider under automobile guest statute. 59 ALR 2d 336.

Applicability of guest statute where motor vehicle accident occurs on private way or property. 64 ALR 2d 694.

Vehicle owner or his agent having general right of possession and control as guest of driver within guest statute or similar rule. 65 ALR 2d 312.

Infant as guest within automobile guest statute. 66 ALR 2d 1304.

Intoxication, unconsciousness, or mental incompetency of person as affecting his status as guest within automobile guest statute or similar common-law rule. 66 ALR 2d 1319.

Injury to guest by alleged negligence of driver of motor vehicle as respects manner of timely application of proper brakes. 72 ALR 2d 6.

32-1114. (1748.2) Assumption of risk by guest in motor vehicle, when. Any person riding in a motor vehicle as a guest or by invitation and not for hire, assumes as between owner and guest the ordinary negligence of the owner or operator of such motor vehicle.

History: En. Sec. 2, Ch. 195, L. 1931.

References

Westergard v. Peterson, 117 M 550, 552, 159 P 2d 518; Watkins v. Williamson, 132 M 46, 314 P 2d 872, 875.

Collateral References

Automobiles—181(1).
60 C.J.S. Motor Vehicles § 399.

32-1115. (1748.3) Imputation of ordinary negligence to guest. The ordinary negligence of the owner or operator of a motor vehicle as between owner and guest is imputed to any person riding in such vehicle as a guest or by invitation and not for hire.

History: En. Sec. 3, Ch. 195, L. 1931.

Instructions to Jury

In action against defendant road contractor for personal injuries sustained when automobile driven by plaintiff's husband ran into ditch in street, instruction was erroneous and prejudicial to plaintiff which did not define contributory negligence as want of ordinary care and failed to adhere to the strict formula of

proximate cause. Wolf v. Barry O'Leary, Inc., 132 M 468, 318 P 2d 582, 585.

References

Westergard v. Peterson, 117 M 550, 552, 159 P 2d 518.

Collateral References

Negligence—93.
65 C.J.S. Negligence § 168.

32-1116. (1748.4) Act not applicable to common carriers or demonstrators. This act shall not relieve a public carrier or any owner or operator of a motor vehicle while the same is being demonstrated to the prospective

purchaser of responsibility for any injury sustained by the passenger being transported by such public carrier or by such owner or operator.

History: En. Sec. 4, Ch. 195, L. 1931.

13 C.J.S. Carriers §§ 676-678; 60 C.J.S. Motor Vehicles § 399.

Collateral References

Carriers ⇨ 280(1); Automobiles ⇨ 181 (2).

Duty and liability of carrier of passengers for hire by automobile. 4 ALR 1499.

32-1117. (1748.5) Regulation of sale and use of sleighs. On and after the first day of January, 1924, it shall be unlawful for any person, firm or corporation in this state to sell any new or first hand draft sleigh, to any person or persons residing in this state for use herein, unless the runners of such sleigh shall measure from center to center four feet and six inches or wider. And on and after January 1st, 1928, it shall be unlawful for any person or persons to use upon any of the public highways of this state any sleigh, unless the runners shall measure from center to center four feet and six inches, or wider.

History: En. Sec. 1, Ch. 101, L. 1923.

Collateral References

Highways ⇨ 168.

40 C.J.S. Highways § 234.

32-1118. (1748.6) Penalty. Any person, firm or corporation violating any of the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than ten dollars (\$10.00) nor more than twenty-five dollars (\$25.00).

History: En. Sec. 2, Ch. 101, L. 1923.

Collateral References

Highways ⇨ 186.

40 C.J.S. Highways § 247.

32-1119. (1749) Moving heavy machinery or loads. All persons owning, controlling, operating or managing threshing machines, steam engines, sawmills, or any heavy loads whatever kind or nature, are required in moving the same over public highways, to lay down planks, not less than one foot wide, three inches in thickness, and of sufficient length on the floors of all bridges and culverts situated on the public highways, while crossing the same, for the wheels of said threshing machines, steam engines, sawmills, or other vehicles carrying heavy loads of any kind to run on; provided, that this section shall not apply to any threshing machines, sawmill, steam engine, or other vehicle carrying heavy loads not exceeding six tons in weight; provided further, that owners and operators of trucks carrying a net load over and above the weight of the truck itself of more than six tons, are hereby made personally liable for breakage or damage done to bridges or culverts, when same have not been planked in accordance with the provisions of this section.

History: En. Sec. 87, Ch. 44, L. 1903; re-en. Sec. 1426, Rev. C. 1907; re-en. Sec. 6, Ch. 8, Ch. 72, L. 1913; re-en. Sec. 6, Ch. 8, Ch. 141, L. 1915; re-en. Sec. 1749, R. C. M. 1921; amd. Sec. 1, Ch. 164, L. 1925.

References

State v. Pepper, 70 M 596, 600, 226 P 1108; Barney v. Board of Railroad Commrs., 93 M 115, 128, 17 P 2d 82.

Collateral References

Bridges ⇨ 27, 32.

11 C.J.S. Bridges §§ 50, 99.

32-1120. (1750) Moving steam engines and the like along highways. All persons owning, controlling, operating, or managing threshing machines, sawmills, or steam engines of any kind, are required in moving the same along the public highways, or meeting any person or persons on horses or mules, or in vehicles drawn by horses or mules, to shut off the steam and halt until such horses or mules shall have safely passed.

History: En. Sec. 88, Ch. 44, L. 1903; re-en. Sec. 1427, Rev. C. 1907; re-en. Sec. 7, Ch. 8, Ch. 72, L. 1913; re-en. Sec. 7, Ch. 8, Ch. 141, L. 1915; re-en. Sec. 1750, R. C. M. 1921.

References

State v. Pepper, 70 M 596, 600, 226

P 1108; Barney v. Board of Railroad Commrs., 93 M 115, 128, 17 P 2d 82.

Collateral References

Highways \Rightarrow 181.
40 C.J.S. Highways § 243.

32-1121. (1751) Penalty for violation of two preceding sections. Any person or persons violating the provisions of the two preceding sections shall be guilty of a misdemeanor, and shall, on conviction thereof, be fined in a sum not less than five dollars nor more than one hundred fifty dollars.

History: En. Sec. 89, Ch. 44, L. 1903; re-en. Sec. 1428, Rev. C. 1907; re-en. Sec. 8, Ch. 8, Ch. 72, L. 1913; re-en. Sec. 8, Ch. 8, Ch. 141, L. 1915; re-en. Sec. 1751, R. C. M. 1921.

References

State v. Pepper, 70 M 596, 600, 226

P 1108; Barney v. Board of Railroad Commrs., 93 M 115, 128, 17 P 2d 82.

Collateral References

Bridges \Rightarrow 47; Highways \Rightarrow 186.
11 C.J.S. Bridges § 53; 40 C.J.S. Highways § 247.

32-1122. (1751.1) Regulation of size and weight of vehicles on public highways. It shall be unlawful and constitute a misdemeanor for any person to drive or move, or for the owner to cause or knowingly permit to be driven or moved, on any public highway any vehicle or vehicles of a size or weight exceeding the limitations stated in this act, or any vehicle or vehicles which are not so constructed or equipped as required in this act or the rules and regulations of the state highway commission, and the maximum size and weight of vehicles herein specified shall be lawful throughout this state, and local authorities shall have no power or authority to alter said limitations or substitute any other limitations or requirements except as express authority may be granted in this act.

History: En. Sec. 1, Ch. 171, L. 1931; amd. Sec. 1, Ch. 123, L. 1947.

Collateral References

Highways \Rightarrow 168.
40 C.J.S. Highways § 234.
25 Am. Jur. 561, Highways, §§ 268, 269.
Liability for damaging highway or

bridge by nature or weight of vehicles or loads transported over it. 5 ALR 768.

Power to limit weight of vehicle or load thereon with respect to use of highways. 26 ALR 747.

Power to limit weight of vehicle or its load with respect to use of streets or highways. 75 ALR 2d 376.

32-1123. Standards of maximum dimensions, weights, etc. The following standards are hereby made applicable to, and shall govern the maximum dimensions and weights of motor vehicles, and other characteristics and factors thereof, operating over the highways of, and in the state of Montana, to the exclusion of any other standards or any other requirements respecting the subject matter:

(1) Width—No vehicle, unladen or with load, shall have a total outside width in excess of ninety-six (96) inches, except buses which may have a

total outside width not to exceed one hundred two (102) inches, and such bus width shall be allowed only on paved highways twenty (20) feet or more in width; provided, however, that this restriction does not apply to implements of husbandry moved or propelled upon the highway during daylight hours for a distance of not more than fifty (50) miles, if the movement is incidental to the farming operations of the owner of the implement of husbandry; provided, further, that with respect to such implements of husbandry having a width in excess of twelve (12) feet, it shall be preceded and followed by flagmen escorts for the purpose of warning other highway users.

(2) Height—No vehicle, unladen or with load, shall exceed a height of thirteen (13) feet, six (6) inches.

(3) Length—(a) No single truck, unladen or with load, shall have an over-all length, inclusive of front and rear bumpers, in excess of thirty-five (35) feet.

(b) No single bus, unladen or with load, shall have an over-all length, inclusive of front and rear bumpers, in excess of forty (40) feet.

(c) No combination of (1) truck-tractor and semitrailer, (2) truck and trailer, or other combination of vehicles, shall consist of more than two units except that, at the discretion of the state highway commission, they may permit combinations of vehicles of not more than three units consisting of (3) tractor-semitrailer-semitrailer converted to full trailer by use of a dolly equipped with fifth wheel which shall be considered a part of the trailer for all purposes and not as a separate unit, or (4) tractor-semitrailer-full trailer, and no such combination of vehicles, unladen or with load, shall have an over-all length, inclusive of front and rear bumpers, in excess of sixty (60) feet, provided that when the combination consists of more than two (2) units the rear unit of such combination shall be equipped with breakaway brakes.

(d) No motor vehicle shall tow more than one motor vehicle and no motor vehicle shall draw more than two motor vehicles attached thereto by the dual saddlemount method, that is by mounting the front wheels of one vehicle on the bed of another leaving the rear wheels only of such vehicle in contact with the roadway, nor shall such combination have an over-all length, inclusive of front and rear bumpers, in excess of sixty (60) feet.

(e) No passenger vehicle or truck of less than two thousand (2000) pounds "manufacturers' rated capacity" shall tow more than one (1) trailer or semitrailer, nor shall such combination have an over-all length, inclusive of front and rear bumpers, in excess of sixty (60) feet.

(4) Permissible Loads—(a) No axle shall carry a load in excess of eighteen thousand (18,000) pounds. An axle load shall be defined as the total load transmitted to the road by all wheels whose centers may be included between two (2) parallel transverse vertical planes forty (40) inches apart, extending across the full width of the vehicle.

(b) The gross weight of any group of axles of any vehicle or combination of vehicles, when the distance between the first and last axles of any group of axles is eighteen (18) feet or less, and the gross weight of

any vehicle when the distance between the first and last axles of all the axles of the vehicle is eighteen (18) feet or less, shall not exceed that set forth in the following table of weights:

Distance in feet between the first and last axles of any group of axles of any vehicle or combination of vehicles, or between the first and last axles of all of the axles of any vehicle.

Maximum gross weight, in pounds, of any group of axles of any vehicle or combination of vehicles, or of any vehicle.

4	32,000
5	32,000
6	32,200
7	32,900
8	33,600
9	34,300
10	35,000
11	35,700
12	36,400
13	37,100
14	43,200
15	44,000
16	44,800
17	45,600
18	46,400

(c) The gross weight of any vehicle or combination of vehicles, where the distance between the first and last axles of the vehicle or combination of vehicles is more than eighteen (18) feet, shall not exceed that set forth in the following table of weights:

Distance in feet between the first and last axles of all the axles of a vehicle or combination of vehicles.

Maximum gross weight, in pounds, of any vehicle or combination of vehicles.

18	46,400
19	47,200
20	48,000
21	48,800
22	49,600
23	50,400
24	51,200
25	55,250
26	56,100
27	56,950
28	57,800
29	58,650
30	59,500
31	60,350
32	61,200
33	62,050
34	62,900
35	63,750
36	64,600
37	65,450
38	66,300

39	68,000
40	70,000
41	72,000
42	73,280
43	73,280
44	73,280
45	73,280
46	73,280
47	73,280
48	73,280
49	73,280
50	73,280
51	73,280
52	73,600
53	74,400
54	75,200
55	76,000
56	76,400
57	76,800

(d) The distance between axles shall be measured to the nearest foot. When a fractional measurement is exactly one-half ($\frac{1}{2}$) foot the next larger whole number shall be used.

(e) The maximum axle and axle group loads stated in paragraphs (a), (b) and (c) of clause (4) above are subject to reasonable reduction in the discretion of the state highway commission during periods when road subgrades have been weakened by water saturation or other causes.

(f) The operation of vehicles or combinations of vehicles having dimensions or weights in excess of the maximum limits herein recommended shall be permitted only if and when authorized by special permit issued by the state highway commission or its officers, supervisors or agents acting pursuant to duly delegated authority from said commission, including the Montana highway patrol.

History: En. Sec. 2, Ch. 123, L. 1947; amd. Sec. 1, Ch. 73, L. 1953; amd. Sec. 1, Ch. 250, L. 1955; amd. Sec. 1, Ch. 221, L. 1959; amd. Sec. 1, Ch. 243, L. 1961.

Evidence of Compliance

Where a prosecution was instituted for the alleged overweight of a truck driven by the defendant and the defendant offered evidence which showed that he had been weighed by a state police weighing station a few hours earlier and was found to be within the legal limit, it was reversible error for the court to direct the jury to return a verdict of guilty. *State v. Baillarger*, 126 M 310, 249 P 2d 799, 801.

Collateral References

Automobiles \Rightarrow 5(1), 6.
60 C.J.S. Motor Vehicles § 32.
5 Am. Jur. 547, Automobiles, §§ 51 et seq.

Construction and application of statute or ordinance designed to prevent use of vehicles or equipment thereof injurious to the highway. 134 ALR 550.

Interstate commerce clause or federal legislation thereunder as affecting state regulations as to size, dimensions and weight of motor vehicle carriers. 135 ALR 1362.

32-1124. Violation of act a misdemeanor. It shall be unlawful and constitute a misdemeanor for any person, firm or corporation to violate any of the provisions of section 32-1123.

History: En. Sec. 3(a), Ch. 123, L. 1947;
amd. Sec. 2, Ch. 243, L. 1961.

References

State v. Baillarger, 126 M 310, 249
P 2d 799, 801.

32-1125. Penalties. Any person, firm or corporation shall be punished by a fine of not less than fifteen dollars (\$15.00) nor more than fifty dollars (\$50.00), excepting as provided below, or by imprisonment in the county or municipal jail for not less than five (5) days nor more than twenty-five (25) days. Any person, firm or corporation convicted of the offense of operating a motor vehicle upon the public highways of this state with weight upon any wheel, axle or group of axles or upon more than one thereof greater than the maximum permitted by section 32-1123, and acts amendatory thereto, shall be fined in addition to and not in substitution for any and all penalties now provided by law for such offense, the following amounts:

Fifteen dollars (\$15.00) for any excess weight up to and including two thousand (2,000) pounds.

Twenty-five dollars (\$25.00) for any excess weight more than two thousand (2,000) pounds and less than four thousand and one (4,001) pounds.

Thirty-five dollars (\$35.00) for any excess weight more than four thousand (4,000) pounds and less than six thousand and one (6,001) pounds.

Fifty dollars (\$50.00) for any excess weight more than six thousand (6,000) pounds and less than eight thousand and one (8,001) pounds.

Eighty dollars (\$80.00) for any excess weight more than eight thousand (8,000) pounds and less than ten thousand and one (10,001) pounds.

One hundred ten dollars (\$110.00) for any excess weight more than ten thousand (10,000) pounds and less than twelve thousand and one (12,001) pounds.

One hundred and fifty dollars (\$150.00) for any excess weight more than twelve thousand (12,000) pounds and less than fourteen thousand and one (14,001) pounds.

Two hundred dollars (\$200.00) for any excess weight more than fourteen thousand (14,000) pounds and less than sixteen thousand and one (16,001) pounds.

Two hundred fifty dollars (\$250.00) for any excess weight more than sixteen thousand (16,000) pounds and less than eighteen thousand and one (18,001) pounds.

Three hundred dollars (\$300.00) for any excess weight more than eighteen thousand (18,000) pounds and less than twenty thousand and one (20,001) pounds.

Five hundred dollars (\$500.00) for any excess weight more than twenty thousand (20,000) pounds and less than twenty-five thousand and one (25,001) pounds.

One thousand dollars (\$1,000.00) for any excess weight more than twenty-five thousand (25,000) pounds.

All complaints filed and all summonses or notices to appear, issued pertaining to violations of the gross weight regulations of this act, shall specify the amount of the overweight, which the defendant is alleged to have had upon the vehicle or combination of vehicles.

All fines and forfeitures shall be remitted monthly by the county treasurer to the state treasurer for deposit in the state general fund.

History: En. Sec. 3(b), Ch. 123, L. 1947; amd. Sec. 3, Ch. 243, L. 1961.

fine at not less than \$10 nor more than \$50, or could leave the fixing of the fine to the court, since it did not state the law correctly; the penalty prescribed is fine or imprisonment and that is what the jury should have been informed. *State v. Baillarger*, 126 M 310, 249 P 2d 799, 801.

Instructions to Jury

In a prosecution for the overweight of a truck in violation of section 32-1123 it was reversible error for the judge to instruct the jury that they could fix the

32-1126. (1751.5) Officers may weigh vehicles and require removal of excessive loads—badges and uniforms of highway employees. Any peace officer, officer of the Montana highway patrol, or employees of the state highway commission having reason to believe that the weight of a vehicle and load is unlawful are authorized and empowered to weigh the same, either by means of portable or stationary scales, and may require that such vehicle be driven to the nearest scales in the event such scales are within two (2) miles. The peace officer, officer of the Montana highway patrol, or employees of the state highway commission may then require the driver to unload immediately such portion of the load as may be necessary to decrease the weight of such vehicle to conform to the maximum allowable weights specified in section 32-1123.

All commodities and material so unloaded as required by this section shall be cared for and removed from the highway right of way by the owner or operator of such vehicle at the risk of such owner or operator. Such removal shall be within such reasonable time as may be designated by the peace officer, officer of the highway patrol, or employees of the Montana state highway commission who has compelled such unloading.

Employees of the state highway commission engaged in the enforcement of this act shall wear and prominently display an identification badge or device with the employee's name and title shown thereon. The state highway commission may in its discretion authorize uniform dress for state highway commission employees engaged in the enforcement of this act.

History: En. Sec. 5, Ch. 171, L. 1931; amd. Sec. 4, Ch. 184, L. 1939; amd. Sec. 4, Ch. 243, L. 1961.

32-1127. (1751.6) Permits for excess size and weight. The state highway commission, and local authorities in their respective jurisdiction, may, in their discretion, upon application in writing and good cause being shown therefor, issue a special permit in writing, authorizing the applicant to operate or move a vehicle of a size or weight exceeding the maximum specified in this act upon any highway under the jurisdiction of and for the maintenance of which the body granting the permit is responsible; provided, however, that only the state highway commission shall have the discretion to issue permits for movement of vehicles carrying built-up or

reducible loads in excess of nine (9) feet in width or exceeding the length, height, or weight specified in this act said permit shall be issued in the public interest; provided, however, that any carrier receiving this permit must have public liability and property damage insurance for the protection of the traveling public as a whole. No permit shall be issued for a period of more than nine (9) months.

The applicant for any special permit shall specifically describe the vehicle or vehicles and load to be operated or moved, and the particular state highways for which to operate is requested and whether such permit is required for single trip or for continuous operation. All fees collected under this act shall be forwarded to the state treasurer for deposit in the state highway general fund.

(a) Special Permits—Discretion of Issuer—Conditions. The state highway commission or local authority is authorized to issue or withhold such special permit at its discretion, or, if such permit is issued, to limit the number of trips, or to establish seasonal or other time limitations within which the vehicle described may be operated on the public highways indicated, or otherwise to limit or prescribe conditions of operation of such vehicle or vehicles when necessary to assure against damage to the road foundation, surfaces or structures or safety of traffic and may require such undertaking or other security as may be deemed necessary to compensate for injury to any roadway or road structure.

(b) Special Permits—Fees. The following fees, in addition to the regular license and gross vehicle weight fees, shall be paid for all movements under special permits on the public highways under the jurisdiction of the state highway commission:

Three dollars (\$3.00) for each permit issued in excess of the size and weight specified in this act; provided, however, that term or blanket permits shall not be issued for overwidth loads in excess of fifteen (15) feet, overlength loads in excess of seventy (70) feet, and overheight loads in excess of a limit determined by the state highway commission. Loads in excess of these dimensions will be limited to trip permits.

In addition to the three dollar (\$3.00) fee specified herein for overweight permits, there shall be charged for single trip permits: five dollars (\$5.00) for distances to and including one hundred (100) miles; fifteen dollars (\$15.00) for distances from one hundred one (101) to one hundred ninety-nine (199) miles; and twenty-five dollars (\$25.00) for distances over two hundred (200) miles traveled, for such excess load over the gross allowable load specified in this section or the sum of the excess axle loads, whichever is greater.

(c) Special Permits—Misrepresentations and Violations—Penalty—Display of Permit. Any person who knowingly and willfully misrepresents the size or weight of any load in obtaining a special permit or does not follow the requirements and conditions of the special permit or who operates any vehicle, the gross weight of which is in excess of the maximum for which such vehicle may be eligible for license, without first obtaining a special permit, is guilty of a misdemeanor.

Every special permit issued hereunder shall be carried in the vehicle or combination of vehicles to which it refers and shall be open to inspection

by any peace officer, officer of the Montana highway patrol, or employees of the state highway commission.

A peace officer, officer of the Montana highway patrol, or employees of the state highway commission who shall find any person operating a vehicle in violation of the conditions of a special permit issued hereunder may confiscate such permit and forward the same to the state highway commission which may return it to the permittee or revoke, cancel, or suspend it without refund. The state highway commission shall keep a record of all action taken upon permits so confiscated and if a permit shall be returned to the permittee, the action taken by the commission shall be endorsed thereon. Any permittee whose permit is suspended or revoked may, upon request, receive a hearing before the commission or person designated by the commission. The commission, after such hearing, may reinstate any permit or revise its previous action.

History: En. Sec. 6, Ch. 171, L. 1931;
amd. Sec. 2, Ch. 147, L. 1933; amd. Sec.
5, Ch. 184, L. 1939; amd. Sec. 1, Ch. 254,
L. 1955; amd. Sec. 5, Ch. 243, L. 1961.

References

Pilgeram v. Haas, 118 M 431, 167 P 2d
339, 348.

32-1128. (1751.7) When state or local road authorities may restrict right to use highways. State or local road authorities may by ordinance or resolution prohibit the operation of vehicles upon any public highway under their respective jurisdictions or impose restrictions as to the weight of vehicle when operated upon any public highway under the jurisdiction of and for the maintenance of which such authorities are responsible, whenever any said highway by reason of deterioration, rain, snow or other climatic conditions will be seriously damaged or destroyed unless the use of vehicles thereon are prohibited or the permissible weights thereof reduced. Such authorities enacting any such ordinance or resolution shall erect or cause to be erected signs designating the provisions of the ordinance or resolution at each end of that portion of any highway affected thereby, and the ordinance or resolution shall not be effective until or unless such signs are erected. Such authorities may also, by ordinance or resolution, prohibit the operation of trucks or other commercial vehicles, or impose limitations as to the weight thereof on designated highways, which prohibitions and limitations shall be designated by appropriate signs placed on such highways.

History: En. Sec. 7, Ch. 171, L. 1931;
amd. Sec. 6, Ch. 184, L. 1939.

Collateral References

Automobiles↪6; Highways↪168.
40 C.J.S. Highways § 234; 60 C.J.S.
Motor Vehicles § 32.

32-1129. (1751.8) Restrictions as to tire equipment. (a) Every solid rubber tire on a vehicle moved on any highway shall have rubber on its entire traction surface at least one (1) inch thick above the edge of the flange of the entire periphery.

(b) No tire on a vehicle moved on a highway shall have on its periphery any block, stud, flange, cleat, or spike, or any other protuberances of any material other than rubber which projects beyond the tread of the traction surface of the tire, except that it shall be permissible to use tire

chains of reasonable proportions upon any vehicle when required for safety because of snow, ice or other conditions tending to cause a vehicle to slide or skid.

(c) The state highway commission and local authorities in their respective jurisdictions may in their discretion, issue special permits authorizing the operation upon a highway of traction engines or tractors having movable tracks, with transverse corrugations upon the periphery of such movable tracks on farm tractors or other farm machinery.

History: En. Sec. 8, Ch. 171, L. 1931.

32-1130. (1751.9) Penalties for misdemeanor. (a) It shall be unlawful and constitute a misdemeanor for any person, firm or corporation to violate any of the provisions of this act unless such violation is by this act or other law of this state declared to be a felony.

(b) Any person, firm or corporation first convicted of a misdemeanor for a violation of any of the provisions of this act for which another penalty is not provided shall for a conviction thereof be punished by a fine of not less than ten dollars (\$10.00) nor more than fifty dollars (\$50.00), or by imprisonment in the county or municipal jail for not less than five (5) days nor more than twenty-five (25) days; for a second such conviction within one (1) year thereafter such person, firm or corporation shall be punished by a fine of not less than fifty dollars (\$50.00), nor more than two hundred dollars (\$200.00) or by imprisonment in the county or municipal jail for not less than twenty-five (25) days nor more than one hundred (100) days, or by both such fine and imprisonment; upon a third or subsequent conviction within one (1) year after the first conviction such person, firm or corporation shall be punished by a fine of not less than two hundred dollars (\$200.00), nor more than five hundred dollars (\$500.00), or by imprisonment in the county or municipal jail for not less than one hundred (100) days nor more than six (6) months, or by both such fine and imprisonment.

History: En. Sec. 9, Ch. 171, L. 1931;
amd. Sec. 7, Ch. 184, L. 1939.

References

Pilgeram v. Haas, 118 M 431, 167 P 2d
339, 348.

Collateral References

Highways 186.
40 C.J.S. Highways § 247.

32-1131. (1752) Disposition of fines. Any and all fines collected for the violation of any of the provisions of this act shall belong to the general road fund of the county, and shall, immediately after their collection, be paid over by the court or magistrate collecting the same to the county treasurer for the use and benefit of that fund.

History: En. Sec. 1, Ch. 10, Ch. 72, L.
1913; re-en. Sec. 1, Ch. 10, Ch. 141, L. 1915;
re-en. Sec. 1752, R. C. M. 1921.

References

State v. Pepper, 70 M 596, 600, 226
P 1108; Barney v. Board of Railroad
Commrs., 93 M 115, 128, 17 P 2d 82.

Collateral References

Fines 20; Highways 99¼.
36 C.J.S. Fines § 19; 40 C.J.S. Highways
§ 176.

32-1132 to 32-1142. (1753 to 1754.5, 1754.7 to 1754.10) **Repealed—Chapter 263, Laws of 1955.****Repeal**

These sections (secs. 9, 11, Ch. 75, L. 1917; Sec. 1, Ch. 110, L. 1919; Secs. 1 to 4, Ch. 134, L. 1931; Secs. 1, 3, Ch. 70, L. 1933; Secs. 1 to 3, Ch. 81, L. 1933), relating to accessories and lights on vehicles, high-

ways under construction, detours, through routes, parking on bridges, obstruction of highways, and hit and run violations, were repealed by Sec. 158, Ch. 263, Laws 1955, effective July 1, 1955.

32-1143. Use of white colored canes restricted to blind. No person, except those wholly or partially blind, shall carry or use on any street, highway or in any other public place, a cane or walking stick which is white in color, or white tipped with red.

History: En. Sec. 1, Ch. 7, L. 1941.

32-1144. Duty of pedestrian or driver approaching blind person carrying white cane. Any pedestrian who is not wholly or partially blind, or any driver of a vehicle who approaches or comes in contact with a person wholly or partially blind carrying a cane or walking stick white in color, or white tipped with red, shall immediately come to a full stop and take such precautions before proceeding as may be necessary to avoid accident or injury to the person wholly or partially blind.

History: En. Sec. 2, Ch. 7, L. 1941.

32-1145. Canes—regulation of carrying—penalty. Any person other than a person wholly or partially blind who shall carry a cane or walking stick such as is described in this act, contrary to the provisions of this act, or who shall fail to heed the approach of a person carrying such a cane as is described by this act, or who shall fail to come to a full stop when approaching or coming in contact with a person so carrying such a cane or walking stick, or who shall fail to take precaution against accidents or injury to such person after coming to a stop, as provided for herein is guilty of a misdemeanor, punishable by a fine not to exceed twenty-five dollars (\$25.00).

History: En. Sec. 3, Ch. 7, L. 1941.

32-1146. Repealed—Chapter 263, Laws of 1955.**Repeal**

This section (Sec. 1, Ch. 96, L. 1947), relating to the right of way of motorized

fire equipment, was repealed by Sec. 158, Ch. 263, Laws 1955, effective July 1, 1955.

CHAPTER 12

UNIFORM ACCIDENT REPORTING ACT

- Section 32-1201. Definitions.
32-1202. Accidents involving death or personal injuries.
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32-1201. Definitions. The following words and phrases used in this act shall, for the purpose of this act, have the meanings respectively ascribed to them in this act.

- (a) Registrar. The registrar of motor vehicles of this state.
- (b) Supervisor. The supervisor of the Montana highway patrol.
- (c) Board. The Montana highway patrol board of this state, acting through its duly authorized officers and agents.

History: En. Secs. 1, 2, Ch. 210, L. 1939; amd. Sec. 1, Ch. 256, L. 1959.

Cross-Reference

Financial requirements imposed following accident, secs. 53-418 to 53-458.

32-1202. Accidents involving death or personal injuries. (a) The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible, but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of section 32-1204. Every such stop shall be made without obstructing traffic more than is necessary.

(b) Any person failing to stop or to comply with said requirements under such circumstances shall upon conviction be punished by imprisonment for not less than thirty (30) days, nor more than one (1) year, or by a fine of not less than one hundred dollars (\$100.00) nor more than five thousand dollars (\$5,000.00), or by both such fine and imprisonment.

(c) The board shall revoke the license or permit to drive of any resident and any nonresident's operating privilege of any person, so convicted for the period prescribed in section 31-149.

History: En. Sec. 3, Ch. 210, L. 1939; Subd. (c) amd. Sec. 1, Ch. 212, L. 1947; amd. Sec. 2, Ch. 256, L. 1959.

Sufficiency of indictment or information charging failure to stop after accident, give name, etc., or to render assistance. 115 ALR 361.

Collateral References

Automobiles—336.
61 C.J.S. Motor Vehicles § 674.
5 Am. Jur. 920, Automobiles, §§ 780 et seq.

Criminal responsibility of one, other than driver at time of accident, under "hit-and-run" statute. 62 ALR 2d 1130.

Applicability of criminal "hit-and-run" statute to accidents occurring on private property. 77 ALR 2d 1171.

Construction and effect of statute in relation to conduct of driver of automobile after happening of an accident. 16 ALR 1425.

32-1203. Accident involving damage to vehicle. The driver of any vehicle involved in an accident resulting only in damage to a vehicle which is driven or attended by any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible and shall forthwith return to and in every event shall remain at the scene of

such accident until he has fulfilled the requirements of section 32-1204. Every such stop shall be made without obstructing traffic more than is necessary. Any person failing to stop, or comply with said requirements under such circumstances shall be guilty of a misdemeanor.

History: En. Sec. 4, Ch. 210, L. 1939.

32-1204. Duty to give information and render aid. The driver of any vehicle involved in an accident resulting in injury to or death of any person or damage to any vehicle which is driven or attended by any person shall give his name, address, and the registration number of the vehicle he is driving and shall upon request and if available exhibit his operator's or chauffeur's license to the person struck or the driver or occupant of or person attending any vehicle collided with and shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person.

History: En. Sec. 5, Ch. 210, L. 1939.

32-1205. Duty upon striking unattended vehicle. The driver of any vehicle which collides with any vehicle which is unattended shall immediately stop and shall then and there either locate and notify the operator or owner of such vehicle of the name and address of the driver and owner of the vehicle striking the unattended vehicle or shall leave in a conspicuous place in the vehicle struck, a written notice giving the name and address of the driver and of the owner of the vehicle doing the striking and a statement of the circumstances thereof.

History: En. Sec. 6, Ch. 210, L. 1939.

32-1206. Duty upon striking fixtures, or other property upon a highway. The driver of any vehicle involved in an accident resulting only in damage to fixtures or other property legally upon or adjacent to a highway shall take reasonable steps to locate and notify the owner or person in charge of such property of such fact and of his name and address and of the registration number of the vehicle he is driving and shall upon request and if available exhibit his operator's or chauffeur's license and shall make report of such accident when and as required in section 32-1208.

History: En. Sec. 7, Ch. 210, L. 1939;
amd. Sec. 3, Ch. 256, L. 1959.

32-1207. Immediate notice of accidents. The driver of a vehicle involved in an accident resulting in injury to or death of any person or property damage to an apparent extent of one hundred dollars (\$100.00) or more shall immediately by the quickest means of communication give notice of such accident to the local police department if such accident occurs within a municipality, otherwise to the office of the county sheriff or the nearest office of the highway patrol.

History: En. Sec. 8, Ch. 210, L. 1939;
amd. Sec. 4, Ch. 256, L. 1959.

32-1208. Written reports of accidents, additional information, form of report. (a) The driver of a vehicle which is in any manner involved in an accident resulting in bodily injury to or death of any person or total property damage to an apparent extent of one hundred dollars (\$100), or more shall within ten (10) days after such accident, forward a written report of such accident to the board.

(b) Additional information. The board may require any driver of a vehicle involved in an accident, of which report must be made as provided in this section, to file supplemental reports whenever the original report is insufficient, and may require witnesses of accidents to render reports.

(c) Every law enforcement officer who in the regular course of duty, investigates a motor vehicle accident, of which report must be made as required in this act, either at the time of and at the scene of the accident or thereafter by interviewing participants or witnesses shall within ten (10) days after completing such investigation, forward a written report of such accident to the board.

(d) Form of report. The form of accident report required under section 32-1208, shall contain information sufficient to enable the department to determine whether the requirements for the deposit of security for safety responsibility are inapplicable by reason of the existence of insurance or other exceptions specified in this act.

History: En. Sec. 9, Ch. 210, L. 1939;
amd. Sec. 5, Ch. 256, L. 1959.

Cross-Reference

Report required to be made to highway patrol supervisor, sec. 53-421.

32-1209. When driver unable to report. (a) An accident report is not required under this act from any person who is physically incapable of making such report during the period of such incapacity.

(b) Whenever the driver of a vehicle is physically incapable of giving an immediate notice of an accident as required in section 32-1207, and there was another occupant in the vehicle at the time of the accident capable of doing so, such occupant shall make or cause to be given the notice not given by the driver.

(c) Whenever the driver is physically incapable of making a written report of an accident as required in section 32-1208, and such driver is not the owner of the vehicle, then the owner of the vehicle involved in such accident shall within ten (10) days after learning of such accident, make such report not made by the driver.

(d) False reports. Any person who gives information in reports as required in section 32-1208, or in this section, knowing or having reason to believe that such information is false shall be fined not more than five hundred dollars (\$500.00) or imprisonment for not more than six (6) months, or both.

History: En. Sec. 10, Ch. 210, L. 1939;
amd. Sec. 6, Ch. 256, L. 1959.

32-1210. Accident report forms. (a) The board shall prepare and upon request supply to police departments, coroners, sheriffs, garages and other suitable agencies or individuals, forms for accident reports

required hereunder, appropriate with respect to the persons required to make such reports and the purposes to be served. The written reports to be made by persons involved in accidents and by investigating officers shall call for sufficiently detailed information to disclose with references to a traffic accident the causes, conditions then existing, and the persons and vehicles involved.

(b) Every accident report required to be made in writing shall be made on the appropriate form approved by the board and shall contain all of the information required therein unless not available.

(c) Penalty. The board may suspend the license or permit to drive of any resident and any nonresident operating privilege of any person failing to report an accident as herein provided until such report has been filed. Any person convicted of failing to report an accident by the quickest means of communication or failing to forward a written report as required herein shall be deemed guilty of a misdemeanor and punished by a fine of not more than twenty-five dollars (\$25.00).

History: En. Sec. 11, Ch. 210, L. 1939;
amd. Sec. 7, Ch. 256, L. 1959.

32-1211. Coroners to report. Every coroner or other official performing like functions shall on or before the 10th day of each month report in writing to the board the death of any person within his jurisdiction during the preceding calendar month as the result of a traffic accident, giving the time and place of the accident and the circumstances relating thereto.

History: En. Sec. 12, Ch. 210, L. 1939;
amd. Sec. 8, Ch. 256, L. 1959.

Collateral References

Coroners↔8.
18 C.J.S. Coroners § 12.

32-1212. Garages to report. The person in charge of any garage or repair shop to which is brought any motor vehicle which shows evidence of having been involved in an accident of which report must be made as provided in section 32-1208, or struck by any bullet, shall report to the supervisor within twenty-four hours after such motor vehicle is received, giving the engine number, registration number and the name and address of the owner or operator of such vehicle.

History: En. Sec. 13, Ch. 210, L. 1939.

Collateral References

Automobiles↔336.
61 C.J.S. Motor Vehicles § 674.

32-1213. Accident reports confidential. (a) All required accident reports and supplemental reports shall be without prejudice to the individual so reporting and shall be for the confidential use of the board or other state agencies having use for the records for accidental prevention purposes, or for the administration of the laws of this state relating to the deposit of security and proof of financial responsibility by persons driving or the owners of motor vehicles, except that the board may disclose the identity of a person involved in an accident when such identity is not otherwise known or when such person denies his presence at such accident.

(b) All accident reports and supplemental information filed in connection with the administration of the laws of this state relating to the deposit

of security or proof of financial responsibility shall be confidential and not open to general public inspection, nor shall copying of lists of such reports be permitted, except, however, that such reports and supplemental information may be examined by any person named therein or by his representative designated in writing.

(c) No such report shall be used as evidence in any trial, civil or criminal, arising out of an accident, except that the board shall furnish upon demand of any person who has, or claims to have, made such a report or upon the demand of any court, a certificate showing that a specified accident report has or has not been made to the board solely to prove a compliance or a failure to comply with the requirement that such a report be made to the board.

History: En. Sec. 14, Ch. 210, L. 1939;
amd. Sec. 9, Ch. 256, L. 1959.

32-1214. Supervisor to tabulate and analyze accident reports. The supervisor shall tabulate and may analyze all accident reports and shall publish annually or at more frequent intervals statistical information based thereon as to the number and circumstances of traffic accidents.

History: En. Sec. 15, Ch. 210, L. 1939.

32-1215. Any incorporated city may require accident reports. Any incorporated city, town, village, or other municipality may by ordinance require that the driver of a vehicle involved in an accident shall also file with a designated city department a report of such accident or a copy of any report herein required to be filed with the supervisor. All such reports shall be for the confidential use of the city department and subject to the provisions of section 32-1213.

History: En. Sec. 16, Ch. 210, L. 1939.

32-1216. Uniformity of interpretation. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History: En. Sec. 17, Ch. 210, L. 1939.

32-1217. Short title. This act will be cited as the Uniform Accident Reporting Act.

History: En. Sec. 18, Ch. 210, L. 1939.

CHAPTER 13

GOOD ROADS DAY

Section 32-1301. Proclamation by governor.

32-1301. (1764) Proclamation by governor. The third Tuesday in June in each year is hereby designated "Good Roads Day," and the governor shall annually, on or before the first day of June, by public proclamation, request the people of the state to contribute labor, material,

or money towards the improvement of public highways in their respective communities upon that day.

History: En. Sec. 1, Ch. 20, L. 1915;
re-en. Sec. 1764, R. C. M. 1921.

Collateral References
Highways \Rightarrow 97%.
40 C.J.S. Highways § 175.

CHAPTER 14

PRIVATE ROADS, HOW ESTABLISHED

Section 32-1401. How established.

32-1401. (1765) How established. Private roads may be established in the manner provided in sections 93-9901 to 93-9926. But in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof must be first determined by a jury, and such amount together with the expenses of the proceeding, must be paid by the person to be benefited.

History: En. Sec. 2780, Pol. C. 1895;
re-en. Sec. 1435, Rev. C. 1907; re-en. Sec.
1765, R. C. M. 1921. Cal. Pol. C. Sec. 2692.

Commissioners Not Required

Under this section and section 93-9923, authorizing the establishment of a private road, the appointment of commissioners to determine the damages occasioned thereby, etc., is not necessary, the matters ordinarily determined by commissioners in eminent domain proceedings being determinable in such a case by the jury. *Komposh v. Powers et al.*, 75 M 493, 500 et seq., 244 P 298.

Expenses of Action

The provision for an award of expenses of the proceeding to defendant in action to open a private road applies only where the plaintiff is successful. *Kendrick v. Powell*, 119 M 623, 178 P 2d 859.

Attorney's fees are not allowed as an expense of a proceeding in condemnation for a private road of necessity under this

section or section 93-9923. Section 93-9922 adapts sections 93-8601 and 93-8618 to the proceedings. Attorney's fees in condemnation proceedings are not enumerated in 93-8601 nor allowed under 93-8618 as a cost or disbursement unless specifically authorized by law or according to the course and custom of the court. In Montana it is not customary to include attorney's fees as a cost; and in this section and 93-9923, "expense" is synonymous with the term "cost." *Tomten v. Thomas*, 125 M 159, 232 P 2d 723, 725, 26 ALR 2d 1285.

Collateral References

Private Roads \Rightarrow 2(1-7).
72 C.J.S. Private Roads § 5 et seq.

Right of owner of easement of way to make improvements or repairs thereon. 112 ALR 1303.

Right to park vehicles on private way. 37 ALR 2d 944.

CHAPTER 15

FERRIES

- Section 32-1501. Ferries between counties.
32-1502. Notice of application.
32-1503. Application for leave and notice.
32-1504. The hearing.
32-1505. Duty of board of commissioners.
32-1506. Report of owner or keeper of ferry.
32-1507. Power and duty of commissioners in regard to ferry.
32-1508. All passengers must be accommodated.
32-1509. Penalties recovered, how disposed of.
32-1510. Bond to be given.
32-1511. License tax of ferry connecting two counties, how paid.
32-1512. Interested commissioner must not act.
32-1513. Ferry within one mile of another, when.

- 32-1514. Owner of land preferred.
- 32-1515. How land acquired for use of ferry.
- 32-1516. Must post rates of toll.
- 32-1517. Keep banks in repair.
- 32-1518. Tax levy for construction, maintenance, and repair of public ferries.

32-1501. (1766) Ferries between counties. When authority to erect and keep ferry over waters dividing two counties is desired, application must be made to the board of commissioners of that county situated on the left bank descending such river, creek, or slough.

History: En. Sec. 2820, Pol. C. 1895; re-en. Sec. 1457, Rev. C. 1907; re-en. Sec. 1766, R. C. M. 1921. Cal. Pol. C. Sec. 2843.

References

State ex rel. Rankin v. Martin, 68 M 392, 397, 219 P 632.

Collateral References

Ferries \hookrightarrow 11.
36 C.J.S. Ferries § 28.
22 Am. Jur. 554, Ferries, §§ 3 et seq.

Power of municipal corporation to purchase or charter a boat or barge. 39 ALR 1332.

32-1502. (1767) Notice of application. The board of commissioners must not grant authority to erect a toll ferry until the notice of such intended application has been given as required in this article.

History: En. Sec. 2821, Pol. C. 1895; re-en. Sec. 1458, Rev. C. 1907; re-en. Sec. 1767, R. C. M. 1921. Cal. Pol. C. Sec. 2844.

References

State ex rel. Rankin v. Martin, 68 M 392, 397, 219 P 632.

Collateral References

Ferries \hookrightarrow 14.
36 C.J.S. Ferries § 11.

32-1503. (1768) Application for leave and notice. Every applicant for authority to erect and take tolls on a public ferry must publish notice in at least one newspaper in each county in which the ferry is or touches, or if there is no newspaper published therein, then in one published in an adjoining county, and by posting three notices in three public places in the township for four successive weeks, specifying the location and the time and place when and where the application will be made. After notice is given application must be made in writing, under oath, to the board of commissioners of the proper county, the landings of the proposed ferry must be described, and the names of the owners thereof given, if known; and if the applicant is not the owner of the land, that notice of the application has been served on the owner thereof at least ten days prior to the application.

History: En. Sec. 2822, Pol. C. 1895; re-en. Sec. 1459, Rev. C. 1907; re-en. Sec. 1768, R. C. M. 1921. Cal. Pol. C. Sec. 2892.

References

State ex rel. Rankin v. Martin, 68 M 392, 397, 219 P 632.

32-1504. (1769) The hearing. At the hearing, proof of giving the notice, required by the preceding section, must be made, and any person may appear and contest the application. If the board finds that the ferry is either a public necessity or convenience, and that the applicant is a suitable person, and by reason of the ownership of the landing, or failure of the owner thereof to apply is entitled thereto, authority to erect and take tolls on the ferry may be granted to him for the term of ten years.

History: En. Sec. 2823, Pol. C. 1895; re-en. Sec. 1460, Rev. C. 1907; re-en. Sec. 1769, R. C. M. 1921. Cal. Pol. C. Sec. 2893.

References

State ex rel. Rankin v. Martin, 68 M 392, 397, 219 P 632.

32-1505. (1770) Duty of board of commissioners. The board of commissioners granting authority to keep a public ferry must at the same time:

1. Fix the amount of a penal bond to be given by the person or corporation owning or taking tolls on the ferry for the benefit of the county, and all persons crossing or desiring to cross the same, and provide for the annual renewal thereof.

2. Fix the amount of license tax to be paid by the person or corporation for taking tolls thereon, not less than three dollars nor over one hundred dollars per month, payable annually.

3. Fix the rate of tolls which may be collected for crossing the ferry.

4. Make all necessary orders relative to the construction, erection, and business of ferries which they have by law the power to make. The board of commissioners may, at any time they see fit, authorize and maintain fords across any water within any distance of any ferry.

History: En. Sec. 2824, Pol. C. 1895;
re-en. Sec. 1461, Rev. C. 1907; re-en. Sec.
1770, R. C. M. 1921. Cal. Pol. C. Sec. 2845.

Collateral References
Ferries \Rightarrow 30, 30½, 31.
36 C.J.S. Ferries §§ 14, 24, 25, 29.

References

State ex rel. Rankin v. Martin, 68 M
392, 397, 219 P 632.

32-1506. (1771) Report of owner or keeper of ferry. Every owner or keeper of a ferry must report annually to the board of commissioners from which his license is obtained, under oath, the following facts:

1. The actual cost of the construction or erection and equipment of the ferry.

2. The repairs made during the preceding year, and the actual cost thereof.

3. The expense of labor and hire of agents, and other costs necessarily incurred in and about the conduct of his business.

4. The amount of tolls collected; and

5. The estimated actual cash value of the ferry, exclusive of the franchise.

History: En. Sec. 2825, Pol. C. 1895;
re-en. Sec. 1462, Rev. C. 1907; re-en. Sec.
1771, R. C. M. 1921. Cal. Pol. C. Sec. 2847.

Collateral References
Ferries \Rightarrow 27.
36 C.J.S. Ferries §§ 22, 23.

References

State ex rel. Rankin v. Martin, 68 M
392, 397, 219 P 632.

32-1507. (1772) Power and duty of commissioners in regard to ferry. The board of commissioners may make all needful rules and regulations for the government of ferries and ferry-keepers, prescribing:

1. How many boats must be kept, their character, and how propelled.

2. The number of hands, boatmen, or ferrymen to be employed, and rules for their government.

3. When and under what circumstances to make trips in the night-time.

4. Who may be ferried free of toll.

5. In what cases of danger or peril not to cross.

6. Penalties for violation of regulations.
7. In case of steamboats, the rate of speed.
8. The method of and preference in loading and crossing; and
9. How and by whom action must be brought to recover penalties.

History: En. Sec. 2826, Pol. C. 1895;
re-en. Sec. 1463, Rev. C. 1907; re-en. Sec.
1772, R. C. M. 1921. Cal. Pol. C. Sec. 2894.

References
State ex rel. Rankin v. Martin, 68 M
392, 397, 219 P 632.

32-1508. (1773) All passengers must be accommodated. Subject to the foregoing regulations, ferry-keepers must make trips to accommodate all passengers who desire to cross, and any failure so to do subjects the franchise to forfeiture, by a proper proceeding for that purpose.

History: En. Sec. 2827, Pol. C. 1895;
re-en. Sec. 1464, Rev. C. 1907; re-en. Sec.
1773, R. C. M. 1921.

Collateral References
Ferries↔28.
36 C.J.S. Ferries § 27.
22 Am. Jur. 561, Ferries, §§ 17 et seq.

References

State ex rel. Rankin v. Martin, 68 M
392, 397, 219 P 632.

Ferry operator's duty as regards auto-
mobiles or their occupants. 82 ALR 798.

32-1509. (1774) Penalties recovered, how disposed of. Penalties recovered under this chapter must be paid to the county treasury for the use of the general road fund of the county.

History: En. Sec. 2828, Pol. C. 1895;
re-en. Sec. 1465, Rev. C. 1907; re-en. Sec.
1774, R. C. M. 1921. Cal. Pol. C. Sec. 2895.

Collateral References
Ferries↔34.
36 C.J.S. Ferries § 32.

References

State ex rel. Rankin v. Martin, 68 M
392, 397, 219 P 632.

32-1510. (1775) Bond to be given. The bond required of the owner or keeper of the ferry must be in the sum fixed by the board of commissioners, with one or more sureties, and conditioned that the ferry will be kept in good repair and condition, and that the keeper will faithfully comply with the laws of the state and all legal orders of the board of commissioners regulating the same, and pay all damages recovered against him by any person injured or damaged by reason of delay at or defect in such ferry, or in any manner resulting from a noncompliance with the laws or lawful orders regulating the same. The bond must be approved by the board of commissioners.

History: En. Sec. 2829, Pol. C. 1895;
re-en. Sec. 1466, Rev. C. 1907; re-en. Sec.
1775, R. C. M. 1921. Cal. Pol. C. Sec. 2850.

Collateral References
Ferries↔30½.
36 C.J.S. Ferries § 29.

References

State ex rel. Rankin v. Martin, 68 M
392, 397, 219 P 632.

32-1511. (1776) License tax of ferry connecting two counties, how paid. The license tax for a ferry connecting two counties must be paid to the treasurer of the county granting it, and the license issued, but the treasurer of such county must pay to the treasury of the county in which

the other end or landing of the ferry is located one-half of the sum so received annually.

History: En. Sec. 2830, Pol. C. 1895; re-en. Sec. 1467, Rev. C. 1907; re-en. Sec. 1776, R. C. M. 1921. Cal. Pol. C. Sec. 2851.

References

State ex rel. Rankin v. Martin, 68 M 392, 397, 219 P 632.

Collateral References

Ferries⇒30.

36 C.J.S. Ferries § 24.

Situs of ferry boats for taxation. 6 ALR 2d 1391.

32-1512. (1777) Interested commissioner must not act. When a county commissioner is interested in an application to erect, construct, or take tolls on a ferry, he must not act in any such matters.

History: En. Sec. 2831, Pol. C. 1895; re-en. Sec. 1468, Rev. C. 1907; re-en. Sec. 1777, R. C. M. 1921. Cal. Pol. C. Sec. 2852.

References

State ex rel. Rankin v. Martin, 68 M 392, 397, 219 P 632.

Collateral References

Ferries⇒14.

36 C.J.S. Ferries § 11.

32-1513. (1778) Ferry within one mile of another, when. No toll-ferry must be established within one mile immediately above or below a regularly established ferry, unless the situation of a town or village, the crossing of a public highway, or the intersection of some creek or ravine renders it necessary for public convenience. In addition to the public notice hereinafter required, notice of intention to apply for authority to erect a toll-ferry, as in this section provided, must be served upon the proprietor of the ferry already established, at least ten days prior thereto, giving the time and place and grounds of such application.

History: En. Sec. 2832, Pol. C. 1895; re-en. Sec. 1469, Rev. C. 1907; re-en. Sec. 1778, R. C. M. 1921. Cal. Pol. C. Sec. 2853.

References

State ex rel. Rankin v. Martin, 68 M 392, 397, 219 P 632.

Collateral References

Ferries⇒21.

36 C.J.S. Ferries § 16.

Right of ferry company not having an exclusive franchise to protection against, or damages for, interference with its operations, property, or plant by a competitor. 119 ALR 456.

32-1514. (1779) Owner of land preferred. The owner of the land on either of the waters to be crossed, and the owner of the land on the left bank descending, over the owner of the land on the right bank, is entitled to preference in procuring authority to construct a ferry; but where such owner fails or neglects to apply for such authority within a reasonable time after the necessity therefor arises, the board of commissioners may grant such authority to another.

History: En. Sec. 2833, Pol. C. 1895; re-en. Sec. 1470, Rev. C. 1907; re-en. Sec. 1779, R. C. M. 1921. Cal. Pol. C. Sec. 2854.

References

State ex rel. Rankin v. Martin, 68 M 392, 397, 219 P 632.

Collateral References

Ferries⇒12.

36 C.J.S. Ferries § 10.

32-1515. (1780) How land acquired for use of ferry. When there are lands necessary for the construction, erection, or use of such ferry which

cannot be procured by agreement between the owner and the landowner, the right of way and all other lands necessary for the use and construction or erection thereof may be acquired by condemnation.

History: En. Sec. 2834, Pol. C. 1895;
re-en. Sec. 1471, Rev. C. 1907; re-en. Sec.
1780, R. C. M. 1921. Cal. Pol. C. Sec. 2855.

Collateral References

Eminent Domain \Rightarrow 22.
29 C.J.S. Eminent Domain § 52.

References

State ex rel. Rankin v. Martin, 68 M
392, 397, 219 P 632.

32-1516. (1781) Must post rates of toll. The owner of every ferry must have the rates of toll as fixed by the board of commissioners printed or written, and posted up in some conspicuous place on or near the ferry.

History: En. Sec. 2835, Pol. C. 1895;
re-en. Sec. 1472, Rev. C. 1907; re-en. Sec.
1781, R. C. M. 1921. Cal. Pol. C. Sec. 2856.

Collateral References

Ferries \Rightarrow 31.
36 C.J.S. Ferries § 25.

References

State ex rel. Rankin v. Martin, 68 M
392, 397, 219 P 632.

32-1517. (1782) Keep banks in repair. All ferry-keepers must keep the banks of the streams or waters at the landings of their ferries graded and in good order for the passage of vehicles. For every day compliance herewith is neglected twenty-five dollars is forfeited, to be collected for the use of the road fund of the county.

History: En. Sec. 2836, Pol. C. 1895;
re-en. Sec. 1473, Rev. C. 1907; re-en. Sec.
1782, R. C. M. 1921. Cal. Pol. C. Sec. 2858.

Collateral References

Ferries \Rightarrow 23.
36 C.J.S. Ferries § 19.

References

State ex rel. Rankin v. Martin, 68 M
392, 397, 219 P 632.

32-1518. Tax levy for construction, maintenance, and repair of public ferries. The board of county commissioners may levy a special tax not to exceed two (2) mills on the dollar of the taxable property of the county for the purpose of constructing, maintaining and repairing public ferries.

History: En. Sec. 1, Ch. 53, L. 1959.

CHAPTER 16

STATE HIGHWAY COMMISSION AND HIGHWAY ENGINEER— POWERS AND DUTIES

- Section** 32-1601. State highway commission—creation—salary—bond—term of office.
32-1602. Meetings—engineer—duties and bond.
32-1603. Duties of commission—reports.
32-1604. Compilation of statistics—investigation and consultation.
32-1604.1. Secondary road information to be provided to county commissioners.
32-1605. County commissioners to furnish information.
32-1606. Commission to prescribe certain rules—designation of state highways.
32-1606.1. Seeding along highways.
32-1607. Office and field men.
32-1608. Contracts, how awarded.
32-1609. Assent to federal aid road act.
32-1610. Division of maintenance and control.

- 32-1611. Repealed.
- 32-1612. Repealed.
- 32-1613. County commissioners may convey right of way.
- 32-1614. Preparation of official road map.
- 32-1615. Rights of way, and other properties, how procured.
- 32-1615.1. Compensation for irrigable lands rendered unusable.
- 32-1616. Highway commission may sell or trade lands when and how, personal property and printed matter.
- 32-1617. Execution and contents of deed.
- 32-1618. Prosecution for violation of highway law.
- 32-1619. State highway fund and trust fund.
- 32-1620. Presentation and payment of claims.
- 32-1621. Unconstitutional.
- 32-1622. Authority for agreements to study, analyze, or test the effects of weights on highways.
- 32-1623. Designation of highways not located entirely and continuously within state as state highways—conditions.
- 32-1624. Powers regarding such highways.
- 32-1625. Facilities of utilities—relocation—cost—definitions.
- 32-1626. Lewis and Clark highway—routes comprising.

32-1601. (1783) State highway commission—creation—salary—bond—term of office. (1) There is hereby created a commission to be known as the state highway commission to consist of five (5) members to be appointed by the governor with the consent of the senate for terms of office as herein provided, and with the qualifications herein specified, and each of said members shall be a citizen of the United States and of the state of Montana.

(2) One (1) of said members shall be a bona fide resident of a district consisting of the following counties: Lincoln, Flathead, Sanders, Lake, Mineral, Missoula, Ravalli, Granite, Lewis and Clark, Jefferson and Broadwater; and one (1) shall be a bona fide resident of a district consisting of the following counties: Powell, Deer Lodge, Silver Bow, Beaverhead, Madison, Gallatin, Meagher, Wheatland, Park and Sweet Grass; and one (1) shall be a bona fide resident of a district consisting of the following counties: Glacier, Toole, Liberty, Hill, Blaine, Pondera, Teton, Chouteau, Cascade, and Judith Basin; and one (1) shall be a bona fide resident of a district consisting of the following counties: Fergus, Petroleum, Garfield, Phillips, Valley, McCone, Prairie, Dawson, Wibaux, Richland, Roosevelt, Daniels and Sheridan; and one (1) shall be a bona fide resident of a district consisting of the following counties: Golden Valley, Stillwater, Carbon, Big Horn, Yellowstone, Musselshell, Rosebud, Treasure, Custer, Powder River, Carter and Fallon. Provided that said districts are herein referred to only for the purpose of defining the sections of the state of Montana from which the members of said commission shall be appointed.

(3) The members of said state highway commission shall be appointed within ten (10) days after the passage of this act. The terms of office of three (3) of the members shall be for four (4) years, and shall expire on February 1, 1957; and the terms of office of the two (2) remaining members shall be for two (2) years, and shall expire on February 1, 1955, and thereafter each succeeding commissioner shall hold his office for a term of four (4) years, and until his successors shall have been appointed and qualified. In case of a vacancy the person appointed to fill such vacancy

shall hold office for the unexpired term in which the vacancy occurs, and such vacancy shall be filled by appointment by the governor with the consent of the senate as hereinbefore provided.

(4) No two (2) members of said state highway commission shall at the time of appointment or thereafter during their respective terms of office be residents of the same district, as defined in [sub]section (2). Not more than three (3) members of said state highway commission, except the first appointments to said state highway commission, shall, at the time of appointment or thereafter during their respective terms of office, be members of the same political party. No elective state official or state officer during the term of office to which he was elected or appointed, or state employee shall be a member of said commission. No state highway commissioner shall be removed from office by the governor before the expiration of his term unless for a disqualifying change of residence or for a cause based upon determination of incapacity, incompetence, neglect of duty and malfeasance in office.

(5) The commission shall choose one (1) of its own number as the chairman, who shall hold office for one (1) year; provided, election as chairman shall not interfere with the member's right to vote on all matters before the commission, and shall have the power to appoint an engineer to be known as the "state highway engineer" and other employees of the commission, and shall fix the salaries of such engineer and other employees.

(6) Each member of the state highway commission shall receive fifteen dollars (\$15.00) per diem for each day actually spent in the performance of his duties and his actual necessary traveling and other expenses in going to, attending and returning from meetings of the commission, and his actual and necessary traveling and other expenses incurred in the discharge of such duties as may be requested of him by a majority vote of the commission, but in no event shall a commissioner's per diem payments exceed fifteen hundred dollars (\$1,500.00) in any one (1) year.

(7) Each commissioner shall give bond conditioned for the faithful performance of his duties in the sum of ten thousand dollars (\$10,000.00).

History: Earlier acts were chapter 170, L. 1917, and chapter 207, L. 1921. This section en. Sec. 1, Ch. 10, Ex. L. 1921; re-en. Sec. 1783, R. C. M. 1921; amd. Sec. 1, Ch. 129, L. 1925; amd. Sec. 1, Ch. 111, L. 1941; amd. Sec. 1, Ch. 86, L. 1945; amd. Sec. 1, Ch. 118, L. 1953.

Compiler's Note

The bracketed prefix "sub" was inserted in subd. (4) by the compiler.

Board Must Act as a Whole

Under this section as amended and now in force, all three of the highway commissioners have equal powers, and it as a whole must function in all official matters, in a convened session. State ex rel. Matson v. O'Hearn, 104 M 126, 139, 65 P 2d 619.

County without Power to Control Acts of Commission

A county, under the state highway act, sections 32-1601 to 32-1620, has no power to control or veto acts done by the commission in compliance with the act. State ex rel. State Highway Commission v. District Court, 105 M 44, 48, 69 P 2d 112.

Custom No Defense to Illegal Fees—Ignorance

A custom or practice of collecting fees not authorized by law, claimed by highway commissioner to have been followed by predecessors in office, cannot have the force of law no matter how long continued, nor may he plead ignorance of the law. Questions of administrative policy and value received were for the gov-

ernor in his hearing on removal from office. *State ex rel. Matson v. O'Hearn*, 104 M 126, 146, 65 P 2d 619.

Status of Commission and Liability of Commissioners

The highway commission is an agency of the state for the accomplishment of the governmental function of establishing, constructing and maintaining a system of highways within the state for use, convenience and benefit of the public. *Coldwater v. State Highway Comm.*, 118 M 65, 162 P 2d 772, 775.

In performing duties imposed upon it by law, the highway commission acts in a governmental capacity. *Coldwater v. State Highway Comm.*, 118 M 65, 162 P 2d 772, 775.

The state highway commission was not liable for the death of occupant of automobile which skidded from highway, allegedly as result of defective condition of highway and absence of signs. *Coldwater v. State Highway Comm.*, 118 M 65, 162 P 2d 772, 775.

Where highway commission was not liable for death caused by defective highway and absence of signs, in absence of legislative sanction, the members of the commission could not be held individually liable except for willful or malicious negligence. *Coldwater v. State Highway Comm.*, 118 M 65, 162 P 2d 772, 775.

The highway commissioners are not required to personally supervise the repair and maintenance of highways, but are only required to exercise general supervision through the state engineer and such other officers and employees as the commissioners deem necessary. *Coldwater v. State Highway Comm.*, 118 M 65, 162 P 2d 772, 775.

Where no notice of negligence of employees or others was alleged and there was no charge of misfeasance or personal negligence against highway commissioners, such commissioners were not liable person-

ally for death of automobile occupant allegedly caused by defective highway and absence of signs. *Coldwater v. State Highway Comm.*, 118 M 65, 162 P 2d 772, 775.

The highway commissioners are responsible only for their own misfeasance and negligence and not for the negligence of those who are employed under them, if commissioners have employed persons of suitable skill. *Coldwater v. State Highway Comm.*, 118 M 65, 162 P 2d 772, 775.

Strictly Construed in Favor of State

Public officers may claim only such compensation as is provided by law, and if not so provided services are deemed to have been gratuitous; statutes relating to fees and compensation must be strictly construed in favor of the government. *State ex rel. Matson v. O'Hearn*, 104 M 126, 142, 65 P 2d 619.

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 255 P 722; *State ex rel. McMaster v. District Court*, 80 M 228, 260 P 134; *State v. State Highway Commission*, 82 M 63, 65, 265 P 1; *State et al. v. Hoblitt et al.*, 87 M 403, 288 P 181; *Arps v. State Highway Commission*, 90 M 152, 300 P 549; *Guillot v. State Highway Commission*, 102 M 149, 151, 56 P 2d 1072; *State ex rel. Holt v. District Court*, 103 M 438, 443, 63 P 2d 1026; *Kirkpatrick v. Douglas*, 104 M 212, 222, 65 P 2d 1169; *Anderson v. United States Civil Service Comm.*, 119 F Supp 567, 573.

Collateral References

Highways—91.
39 C.J.S. *Highways* § 155.
25 Am. Jur. 888, *Highways*, §§ 599 et seq.

Liability, in negligence action, of state highway, or turnpike authority. 62 ALR 2d 1222.

32-1602. (1784) Meetings—engineer—duties and bond. The state highway commission shall meet at least once each month for the purpose of transacting its business, including the consideration of claims and the letting of contracts. Three (3) members shall constitute a quorum at any meeting, but no resolution, motion, or other decision of the commission shall be adopted or passed without the favorable vote of at least three (3) members. The state highway engineer shall perform any acts or duties relating to the office of the highway commission which said commission may, from time to time, impose upon him; such engineer shall take and file the constitutional oath of office before entering the performance of his duties; he shall give a bond in such sum as the commission may determine and may be removed by the commission at any time for cause.

History: En. Sec. 2, Ch. 10, Ex. L. 1921; 2, Ch. 86, L. 1945; amd. Sec. 1, Ch. 117, re-en. Sec. 1784, R. C. M. 1921; amd. Sec. L. 1953.

Governor Not Disqualified by Estoppel in Hearing Removal Charges

In a proceeding under Art. V, Sec. 18, Const., to remove members of commission for collection of illegal fees and per diem, governor was not barred from passing upon accusation by doctrine of estoppel or res judicata because he had passed upon and approved the allegedly illegal claims as a member of the state board of examiners. State ex rel. Matson v. O'Hearn, 104 M 126, 135, 65 P 2d 619.

Removal by Governor

Grant of power to governor to remove a state officer for cause implies authority to judge of the existence of that cause, and he lawfully removed members of highway commission for alleged collection of illegal fees, and as lawfully appointed their successors. State ex rel. Matson v. O'Hearn, 104 M 126, 152, 65 P 2d 619.

In the absence of legislative direction as to the manner in which the governor shall proceed in removing a member of the state commission for cause, he may adopt any method of inquiry not in conflict with public policy of the state, and in hearing charges is clothed with discretion in considering the issues, and not

required to disregard ordinary rules of fair procedure or to hear and admit everything in evidence, however incompetent, irrelevant or repetitious. State ex rel. Matson v. O'Hearn, 104 M 126, 132, 134, 65 P 2d 619.

Repealed in Part by Implication

Section 32-1602, in so far as it relates to the powers of the highway engineer, was impliedly repealed by section 32-1601, a later enactment. Kirkpatrick et al. v. Douglas et al., 104 M 212, 222, 65 P 2d 1169.

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 255 P 722; State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; State et al. v. Hoblitt et al., 87 M 403, 288 P 181; Arps v. State Highway Commission, 90 M 152, 300 P 549; State ex rel. Holt v. District Court, 103 M 438, 443, 63 P 2d 1026; Coldwater v. State Highway Commission, 118 M 65, 162 P 2d 772, 774.

Collateral References

Highways \S 93, 95(1).
39 C.J.S. Highways $\S\S$ 157, 164.

32-1603. (1785) Duties of commission—reports. The state highway commission shall maintain and preserve all its records in its office at the capitol; said office shall be kept open at such times as the business of the commission shall require. The commission shall file and safely keep a record of all proceedings and orders pertaining to the matters under its direction and copies of all plans, specifications, contracts, estimates and official acts. The commission shall prepare and submit to the governor on or before the fifteenth day of each month a report of the work constructed, under construction, and proposed for construction and the progress made during the preceding month, and shall make recommendations as to the needed improvements and their estimated cost. The commission shall prepare and submit to the governor and the legislative assembly during its regular session, and not later than the fifth legislative day, a comprehensive-condensed report of the commission's activities for the preceding biennium. Such report shall include an accounting for all moneys received from federal or state sources; a review of projects undertaken and completed; a summary of maintenance work performed by the commission; statistical tables covering personnel changes, compensation and status; a review of right of way procurement experience, including condemnation proceedings and average price paid per acre of land in representative areas of the state, and all other matters which would assist the legislative assembly in determining the financial and legal requirements of the commission for the following biennium.

History: En. Sec. 3, Ch. 10, Ex. L. 1921; re-en. Sec. 1785, R. C. M. 1921; amd. Sec. 3, Ch. 86, L. 1945; amd. Sec. 1, Ch. 98, L. 1959.

Cross-Reference

Labor on highways, state may require, sec. 83-201.

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 255 P 722; State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; State et al. v. Hoblitt et al., 87 M 403, 288 P 181; Arps v. State Highway Commission, 90 M 152, 300 P 549; State ex rel. Matson v. O'Hearn, 104 M 126,

140, 65 P 2d 619; Coldwater v. State Highway Commission, 118 M 65, 162 P 2d 772, 774.

Collateral References

Highways⇨96(1).
39 C.J.S. Highways § 154.

32-1604. (1786) Compilation of statistics—investigation and consultation. In addition to its other powers and duties, the state highway commission shall compile statistics relative to public highways throughout the state, and shall collect all information in regard thereto deemed expedient. It shall investigate and determine upon various methods of road construction adapted to different sections of the state, and as to the best methods of construction and maintenance of roads, bridges, road markers and shall investigate and determine upon such other information relating thereto as it shall deem appropriate and necessary. The highway commission and the state highway engineer may be consulted at all reasonable times by county officers having care and authority over highways and bridges and shall advise such officers relative to the construction, repair, altering or maintenance of the same, and shall furnish such other information and advice as may be requested by persons interested in the construction, maintenance and marking of public highways, and shall at all times lend their aid in promoting highway improvement throughout the state.

History: En. Sec. 4, Ch. 10, Ex. L. 1921; re-en. Sec. 1786, R. C. M. 1921; amd. Sec. 4, Ch. 86, L. 1945.

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 255 P 722; State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; State et al. v. Hoblitt et al., 87 M

403, 288 P 181; Arps v. State Highway Commission, 90 M 152, 300 P 549; State ex rel. Matson v. O'Hearn, 104 M 126, 140, 65 P 2d 619; Coldwater v. State Highway Commission, 118 M 65, 162 P 2d 772, 774.

Collateral References

Highways⇨96(1).
39 C.J.S. Highways § 154.

32-1604.1. Secondary road information to be provided to county commissioners. On or before August 30 of each year the Montana state highway commission shall provide the board of county commissioners in each county with the following secondary road information:

(a) The total amount of moneys in the secondary road fund and the allocation thereof to each county; and,

(b) The location of proposed secondary road projects when the information is available; and,

(c) Such further information regarding secondary road construction as the state highway commission deems advisable and of interest to the several counties.

History: En. Sec. 1, Ch. 124, L. 1961.

32-1605. (1787) County commissioners to furnish information. The county commissioners and road supervisors of any county, and all other officers who now have or may hereafter have by law the care and supervision of the public highways and bridges, shall, from time to time, upon the written request of the state highway commission, furnish all available

information in connection with the building and maintenance of the state highways and bridges in their respective districts or counties.

History: En. Sec. 5, Ch. 10, Ex. L. 1921; re-en. Sec. 1787, R. C. M. 1921; amd. Sec. 5, Ch. 86, L. 1945.

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 255 P 722; State ex rel. McMas-

ter v. District Court, 80 M 228, 260 P 134; State et al. v. Hoblitt et al., 87 M 403, 288 P 181; Arps v. State Highway Commission, 90 M 152, 300 P 549; Coldwater v. State Highway Commission, 118 M 65, 162 P 2d 772, 774.

32-1606. (1788) Commission to prescribe certain rules—designation of state highways. The state highway commission shall have power and it shall be its duty, to formulate all rules and regulations necessary for the government of the state highway commission and it is hereby authorized to make all rules necessary to comply with the provisions of the Federal Aid Road Act of Congress, approved July 11, 1916, and all other acts granting aid for public highways, and to obtain for the state of Montana the full benefit of such acts. The state highway commission is hereby authorized to, and shall, in conjunction with the board of county commissioners of the several counties in the state, designate such public roads in the state as shall be classed as state highways and subject to improvements under the provisions of said Federal Aid Road Act of Congress, and the state highway commission in conjunction with the board of county commissioners shall also formulate necessary rules and regulations for the construction, repair, maintenance and marking of state highways and bridges, and may provide for local supervision in such cases.

History: En. Sec. 6, Ch. 10, Ex. L. 1921; re-en. Sec. 1788, R. C. M. 1921; amd. Sec. 6, Ch. 86, L. 1945.

Construction with Relation to County Commissioners

This section providing that the state highway commission in conjunction with board of county commissioners shall designate public roads to be classed as state highways, etc., was not open to construction that county boards shall co-operate in the matter of laying out or building new state highways, the "public roads" herein referred to meaning roads previously built and then in use in the several counties, and subject to improvement. State ex rel. State Highway Commission v. District Court, 105 M 44, 50, 69 P 2d 112.

Rules and Regulations

The power of the commission under this section to make rules for the protection of public and men working on repair, construction or maintenance of highways justified giving an instruction that flagman, for whose death action is brought, could assume that drivers of automobiles will obey the traffic laws and regulations. Koppang v. Sevier, 106 M 79, 92, 75 P 2d 790.

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 255 P 722; State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; State et al. v. Hoblitt et al., 87 M 403, 288 P 181; Arps v. State Highway Commission, 90 M 152, 300 P 549; State ex rel. Matson v. O'Hearn, 104 M 126, 141, 65 P 2d 619; Coldwater v. State Highway Commission, 118 M 65, 162 P 2d 772, 774.

Collateral References

Highways \Rightarrow 95(1).
39 C.J.S. Highways § 157.
25 Am. Jur. 889, Highways, §§ 602 et seq.
Power to employ counsel. 2 ALR 1212.
Establishment of highway over park lands. 18 ALR 1248.
Power to limit weight of vehicle or load thereon with respect to use of highways. 26 ALR 747.
Mandamus to compel improvement or repair of street or highway as affected by its abandonment. 46 ALR 266.
Personal liability of highway officers for negligence of subordinates or employees. 61 ALR 300.
Constitutionality and construction of statute relating to location or relocation of highways. 63 ALR 516.
What justifies discontinuance of highway. 68 ALR 794.

Power of highway officers in respect of billboards or other conditions on adjoining property which are deemed dangerous to travel or offensive esthetically to travelers. 81 ALR 1547.

Personal liability of highway officers for injury to property by change of grade, cuts and fills. 90 ALR 1490.

Power and duty of highway officers as regards location or routes of roads to be constructed or improved. 91 ALR 242.

Private citizen's right to complain of rerouting of highway or removal or

change of route or directional signs. 97 ALR 192.

Prohibition to control administrative officers in matters relating to highways and streets. 115 ALR 23.

Officer's failure to maintain highways in proper condition as neglect of duty punishable as an offense. 134 ALR 1256.

Traffic regulations affected by closing of street to general public. 157 ALR 1164.

32-1606.1. Seeding along highways. Whenever a highway, state or federal, is constructed in any part of Montana, it shall be the duty of the state highway commission to see that borrow pits, slopes and road shoulders be seeded to an adaptable perennial grass or combination of perennial grasses and/or legumes wherever it seems suitable for establishment of perennial grass covers, using seed meeting certified standards. Time and method of seeding, fertilizing practices and grass species shall be recommended and specified jointly by the Montana extension service, soil conservation service, and experiment station. Every effort will be made to establish a sod cover on the newly cut-over areas.

History: En. Sec. 1, Ch. 222, L. 1961.

32-1607. (1789) Office and field men. The highway commission shall employ office and field men as it shall deem necessary and the compensation for all such employees shall be determined by the state highway commission to be paid out of the state highway fund in the same manner as other state employees are paid.

At the discretion of the state highway commission, engineers and other persons in their employ may be temporarily assigned for service to any county when a request has been made by the county commissioners thereof. The expense of this service to the counties shall be paid to the state highway fund by the counties receiving such service.

History: En. Sec. 7, Ch. 10, Ex. L. 1921; re-en. Sec. 1789, R. C. M. 1921; amd. Sec. 1, Ch. 155, L. 1945.

v. State Highway Commission, 118 M 65, 162 P 2d 772, 774.

References

Guillot v. State Highway Commission, 102 M 149, 151, 56 P 2d 1072; Coldwater

Collateral References

Highways 95(1, 2).
39 C.J.S. Highways § 157.

Repealed

32-1608. (1790) Contracts, how awarded. All contracts for work on state highways shall be let by the state highway commission, except as hereinafter provided. When the estimated cost of any piece of work shall exceed one thousand dollars (\$1,000.00), it shall be the duty of the state highway commission to let such contract by competitive bidding, upon such notice and upon such terms as the commission by its rules and regulations prescribe; provided that if the commission shall find such work may be done and performed by force account or by day's labor in a more efficient manner, it may so conduct the work, and provided further that the commission may use convict labor as, in its judgment, is deemed

proper. A contractor upon being awarded a contract for construction, improvement, maintenance or marking upon a state highway, and before entering upon such work shall execute to the state of Montana a bond to be approved by the commission, and to be conditioned for the faithful discharge of its duties under such contract. Provided, however, that on any highway construction work, which is financed in whole or in part by federal funds, and the secretary of commerce of the United States of America shall affirmatively find that under the circumstances relating to a given project some other method than competitive bidding is in the public interest, the state highway commission is authorized and empowered to enter into contracts with any board of county commissioners of any county, whereby such county is authorized to acquire rights of way, survey and construct farm to market, secondary or feeder roads within such county, by force account, unit price or otherwise, as may be agreed upon by said state highway commission and said board of county commissioners.

All contracts for work on state highways where federal and/or state funds are involved shall, when applicable, contain the prevailing rates of wages as set by collective bargaining in effect in the areas covered by heavy and highway labor agreements.

History: En. Sec. 8, Ch. 10, Ex. L. 1921; re-en. Sec. 1790, R. C. M. 1921; amd. Sec. 1, Ch. 91, L. 1955; amd. Sec. 1, Ch. 43, L. 1957.

Assignment

Where the assignment of funds to become due one who contracted with the state highway commission to construct a road expressly referred to the contract, the assignee bank was chargeable with knowledge of the contents of the contract; the assignee was further chargeable with notice of the fact that before entering upon the work the contractor was required to furnish bond provided for by this section, and of the rights of the surety and the liabilities of the commission. *Lanstrum et al. v. Zumwalt et al.*, 73 M 502, 237 P 205.

Street Improvements by Municipality

A city may create a special improvement district for street improvements where the street is also a part of a state

highway and, in such instance, the contracts for the work must be awarded by the state highway commission. *Wood v. City of Kalispell*, 131 M 390, 310 P 2d 1058, 1062.

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 255 P 722; *State ex rel. McMaster v. District Court*, 80 M 228, 260 P 134; *State et al. v. Hoblitt et al.*, 87 M 403, 288 P 181; *Arps v. State Highway Commission*, 90 M 152, 300 P 549; *Kirkpatrick v. Douglas*, 104 M 212, 222, 65 P 2d 1169; *Coldwater v. State Highway Commission*, 118 M 65, 162 P 2d 772, 774.

Collateral References

Highways 113(2, 3, 5).
40 C.J.S. Highways §§ 208, 210.
See generally, 43 Am. Jur. 737, *Public Works and Contracts*.

Duty of highway construction contractor to provide temporary way or detour around obstruction. 29 ALR 2d 876.

32-1609. (1791) Assent to federal aid road act. For and on behalf of the state of Montana, and in conformity with the requirement of section 1 of said act, the provisions of that certain act of Congress approved July 11, 1916, known as the Federal Aid Road Act entitled "An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes," is hereby assented to. The state highway commission is hereby authorized to, for and on behalf of the state of Montana, enter into all contracts and agreements with the United States government or any officer, department or bureau thereof, relative

to the construction or maintenance of highways in the state of Montana; and the state highway commission for and on behalf of the state of Montana is hereby authorized to do all other things necessary or required to carry out fully the co-operation contemplated by the said act of Congress as hereby assented to, relative to the construction and maintenance of roads and highways in the state of Montana.

History: En. Sec. 9, Ch. 10, Ex. L. 1921; re-en. Sec. 1791, R. C. M. 1921.

but the trustee thereof. *Bidlingmeyer v. City of Deer Lodge*, 128 M 292, 274 P 2d 821, 823.

Forest Roads

The fact that a road is a part of the federal forest road does not deprive the highway commission of authority to expend any portion of the gasoline license tax funds to match federal aid funds thereon. *State v. State Highway Commission*, 82 M 63, 65, 265 P 1.

Municipal Jurisdiction of Highway

Where, in order to comply with federal requirements in order to make a city street part of federal aid highway, the city adopted a resolution limiting its power to place speed limits and signs on the street, it was not a surrender of the police power of the city, but rather a limitation upon the method or means by which such power might be exercised. City streets belong to the state and the city is

References

Gary Hay & Grain Co., Inc., v. Carlson, 79 M 111, 255 P 722; *State ex rel. McMaster v. District Court*, 80 M 228, 260 P 134; *State et al. v. Hoblitt et al.*, 87 M 403, 288 P 181; *Arps v. State Highway Commission*, 90 M 152, 300 P 549; *State ex rel. State Highway Commission v. District Court*, 105 M 44, 53, 69 P 2d 112; *Wheeler v. Mitchell*, 110 M 385, 388, 101 P 2d 1071; *Coldwater v. State Highway Commission*, 118 M 65, 162 P 2d 772, 774; *Wood v. City of Kalispell*, 131 M 390, 310 P 2d 1058, 1061.

Collateral References

Highways \hookrightarrow 99¼.
40 C.J.S. Highways § 176.

32-1610. (1792) Division of maintenance and control. The state highway commission shall have authority to organize and operate a division of maintenance and control, and by co-operation with the board of county commissioners in the several counties of the state, if necessary, to maintain state highways constructed by the state and such additional mileage as the commission may deem necessary.

History: En. Sec. 10, Ch. 10, Ex. L. 1921; re-en. Sec. 1792, R. C. M. 1921.

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 255 P 722; *State ex rel. McMaster v. District Court*, 80 M 228, 260 P 134; *State et al. v. Hoblitt et al.*, 87 M 403, 288 P 181; *Arps v. State Highway*

Commission, 90 M 152, 300 P 549; *Wheeler v. Mitchell*, 110 M 385, 388, 101 P 2d 1071; *Coldwater v. State Highway Commission*, 118 M 65, 162 P 2d 772, 774.

Collateral References

Highways \hookrightarrow 105(1).
40 C.J.S. Highways § 177.

32-1611, 32-1612. (1793, 1794) Repealed—Chapter 263, Laws of 1955.

Repeal

These sections (Secs. 11, 12, Ch. 10, Ex. L. 1921), relating to the erection of standard guide signs and providing a penalty

for the defacing thereof, were repealed by Sec. 158, Ch. 263, Laws 1955, effective July 1, 1955.

32-1613. (1795) County commissioners may convey right of way. It shall be lawful for boards of county commissioners to transfer and convey to the state of Montana rights of way over and along county roads for state road purposes, and it is hereby made their duty to make such transfer or conveyance upon receiving notice from the state highway commission that a state road has been established and definitely located over a county

road and that said road will be improved and maintained by the state, and that funds are available for the immediate construction of such road.

History: En. Sec. 13, Ch. 10, Ex. L. 1921; re-en. Sec. 1795, R. C. M. 1921.

property. State ex rel. State Highway Commission v. District Court, 105 M 44, 54, 69 P 2d 112.

Purpose—Relinquishment of County Control

This section does not recognize title in the county, making it lawful for commissioners to convey rights of way over established county roads when designated as state highways, but has for its purpose the relinquishment by the county of its control thereover and the fixing, as a matter of record, of responsibility for their supervision and maintenance. Counties are not the owners of public roads established within their boundaries; they belong to the state, and county acts as a trustee and agency through which the state acquires

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 255 P 722; State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; State et al. v. Hoblitt et al., 87 M 403, 288 P 181; Arps v. State Highway Commission, 90 M 152, 300 P 549; Coldwater v. State Highway Commission, 118 M 65, 162 P 2d 772, 774.

Collateral References

Highways—23.
39 C.J.S. Highways § 39.

32-1614. (1796) Preparation of official road map. Upon the selection and approval by the commission of the system of state highways, the commission shall cause to be prepared an official road map of the state of Montana showing outlined thereon the exact location of said state highways prior to October 1, 1921, if possible; a copy of such map shall be filed with each county clerk and after such selection and filing no changes except the necessary relocations and alterations in portions of the state highway system for purposes of construction shall be made by said commission until further investigation or hearings are held in the county or counties in which such change or changes are proposed. If, after investigation or hearing, any alteration or additions shall be deemed expedient by the commission, the change shall be entered in writing upon the records and maps of the commission and each county clerk shall be immediately notified to alter the official map on file with him in accordance therewith.

History: En. Sec. 14, Ch. 10, Ex. L. 1921; re-en. Sec. 1796, R. C. M. 1921.

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 225 P 722; State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; State et al. v. Hoblitt et al., 87 M 403, 288 P 181; Arps v. State Highway Commission, 90 M 152, 300 P 549; Coldwater v. State Highway Commission, 118 M 65, 162 P 2d 772, 774.

Collateral References

Highways—96(1).
39 C.J.S. Highways § 157.

Map—Purpose—Failure to File

The mere failure of the state highway commission to file a map with the county clerk as required by this section, before letting of contract for construction, was insufficient ground for obtaining a restraining order against letting, the purpose of the requirement being to show what roads or highways are under exclusive control and supervision of the commission on the county records. State ex rel. State Highway Commission v. District Court, 105 M 44, 58, 69 P 2d 112.

32-1615. (1797) Rights of way, and other properties, how procured. The state highway commission shall have the power and authority to lay out, alter, construct, improve and maintain highways in the state of Montana.

Notwithstanding any other provision of law, the state highway commission shall have the power and authority to acquire, by purchase or any

other lawful manner, either in fee or in any lesser estate or interest, any lands or other real property, excluding oil, gas and mineral rights, which it deems reasonably necessary for present or future state highway purposes. The acquisition of such lands or real property, or interest therein, for such purposes includes, but is not limited to, that which is deemed reasonably necessary by the state highway commission, for any of the following purposes:

(a) For rights of way, including those necessary for state highways within cities.

(b) For the purposes of exchanging the same for other real property to be used for rights of way or other purposes authorized herein, provided that the same shall not be acquired for such a purpose by condemnation procedures.

(c) For deposits of road building materials for reasonably foreseeable future road building purposes and uses, including rock, gravel, sand or earth; provided however that the right of eminent domain shall not be available for the acquisition of any such deposits of road building materials which may then constitute a component part of an existing private business enterprise.

(d) For offices, weighing stations, shops or storage yards, buildings, rest areas, informational sites or communication facilities.

(e) Parks adjoining or near any state highway, provided that the same shall not be acquired for such a purpose by condemnation procedures.

(f) For the culture and support of trees or shrubs which benefit any state highway by aiding in the maintenance and preservation of the road-bed.

(g) For drainage in connection with any state highway.

(h) For the maintenance of any unobstructed view of any portion of a state highway so as to promote the safety of the traveling public.

(i) For the construction and maintenance of stock lanes or trails.

(j) For the construction and maintenance or replacement of private or public irrigation systems, private or public drainage systems, or natural water or drainage courses made necessary by highway construction.

(k) For providing land or other real property easements or rights of way for necessary relocation of existing utilities, utility easements or other easements for facilities or purposes then in place, or in effect, upon a proposed right of way.

Whenever it shall be deemed necessary by the commission to secure lands or other real property, or rights therein, as herein provided, and the same cannot be acquired by purchase at a price or cost which is deemed reasonable by the commission, the commission may direct the attorney general or any county attorney in any county in the state to procure the lands or other real property by proceedings to be instituted in the manner as provided in sections 93-9901 to 93-9926 against all nonaccepting landholders.

The commission may not so direct the attorney general or any county attorney to procure rights of way, easements, lands or other real property as hereinbefore provided, unless the commission first adopts a resolution

declaring that public interest and necessity require the construction or completion by the state, of the highway or improvement, for one of the purposes set forth in this section, and that the rights of way, easements, lands or other real property, or interest therein, described in such resolution and sought to be condemned is necessary for the improvement and that the same is planned and located in a manner which will be most compatible with the greatest public good and the least private injury.

Such resolution of the commission shall create and establish a disputable presumption of the public necessity of such proposed public improvement; that the taking of such rights of way, easements, lands or other real property or interests therein, and the amount thereof, is necessary therefor; and that the proposed public improvement is planned or located in a manner which will be most compatible with the greatest public good and the least private injury.

Whenever a part of a parcel of land or other real property is to be taken for state highway purposes and the remainder is to be left in such shape or condition as to be of little market value or to give rise to claims or litigation concerning severance or other damage, the state highway commission may acquire the whole parcel and sell the remainder or exchange the same for other property needed for state highway purposes.

The authority conferred by this chapter to acquire rights of way, easements, lands or other real property and interest therein for state highway purposes includes authority to acquire for reasonably foreseeable future needs. The state highway commission is authorized to lease unused portions of any lands which are held for state highway purposes and interstate rights of way which are not presently needed for highway purposes on such terms and conditions as the state highway commission may fix and to maintain and care for such property in order to secure rent therefrom. All rent so received shall be deposited in the state highway fund.

The acquisition of any right of way or easement by the state highway commission for construction, operation, repair, reconstruction, or maintenance of state highways shall include, among other rights, the right to use, remove, relocate, redistribute or otherwise dispose of any and all gravel or other road building materials, found or located within the boundaries of such rights of way or easements and such gravel or materials shall be deemed real property for the purposes of this act.

History: En. Sec. 15, Ch. 10, Ex. L. 1921; re-en. Sec. 1797, R. C. M. 1921; amd. Sec. 1, Ch. 180, L. 1961.

Inability to Purchase

Where the state highway commission seeks to condemn lands for highway purposes it must, in order to invoke the jurisdiction of the court, allege in its complaint that it has been unable to acquire the right of way desired by purchase. *State et al. v. Whitcomb et al.*, 94 M 415, 424, 22 P 2d 823.

Necessity for Taking of Land

The requirement of this section, that land sought to be condemned for highway purposes must be "necessary" does not

mean an absolute necessity for the particular location, but means reasonably requisite for the accomplishment of the end in view, under the circumstances of the case. *State et al. v. Whitcomb et al.*, 94 M 415, 424, 22 P 2d 823.

Where the highway commission selects a particular route for a highway, a land owner whose land is sought to be condemned for right of way will not be heard to say that a different one could have been selected; solution of the question of necessity involves consideration of the questions of the greatest good to the public and the least injury to the owner whose property is sought to be taken. *State et al. v. Whitcomb et al.*, 94 M 415, 424, 22 P 2d 823.

Power to Condemn

The right to obtain a right of way for a state highway by the exercise of condemnation proceedings is lodged exclusively with the state highway commission, the right to be exercised in the name of the state upon direction by the commission to the attorney general or a county attorney. *State ex rel. McMaster v. District Court*, 80 M 228, 260 P 134.

The highway commission is the only tribunal authorized to relocate state highways through the power of eminent domain. A public utility cannot condemn land for a right of way for the relocation of a highway which is necessitated by the fact that the present highway will be affected by the construction of a dam for which the utility is using the eminent domain power. *State v. District Court*, 126 M 183, 248 P 2d 215, 216.

Selection of Routes Discretionary

Held, that where a particular route has been selected and designated by the state highway commission as a highway, it is within its discretion to decide which segment or portion thereof shall be first constructed, and the mere fact that such portion runs through a sparsely settled country and would in itself benefit but few persons does not authorize the courts to enjoin its construction on the ground that cost thereof would constitute a wanton waste of money. *State ex rel. State Highway Commission v. District Court*, 107 M 126, 131, 81 P 2d 347.

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 255 P 722; *State et al. v. Hoblitt et al.*, 87 M 403, 288 P 181; *Arps v. State Highway Commission*, 90 M 152, 300 P 549; *State ex rel. State Highway Commission v. District Court*, 105 M 44, 49, 69 P 2d 112; *Coldwater v. State Highway Commission*, 118 M 65, 162 P 2d 772, 774.

Collateral References

Highways—99, 109.
40 C.J.S. Highways §§ 177, 180.
See generally, 18 Am. Jur. 621, *Eminent Domain*; 25 Am. Jur. 544, *Highways*, §§ 253 et seq.

Constitutionality of statutory provisions as to political corporations or divisions

which shall bear cost of maintaining highways. 2 ALR 746.

Reversion of title upon vacation of public street or highway. 18 ALR 1008.

Mandamus to compel improvement or repair of street or highway as affected by its abandonment. 46 ALR 266.

Right of owner of nonabutting property to compensation for vacation of section of street or highway. 49 ALR 330.

Constitutionality and construction of statute relating to location or relocation of highways. 63 ALR 516.

What justifies discontinuance of highway. 68 ALR 794.

Power of highway officer in respect of billboards or other conditions on adjoining property which are deemed dangerous to travel or offensive esthetically to travelers. 81 ALR 1547.

Personal liability of highway officers for injury to property by change of grades, cuts and fills. 90 ALR 1490.

Power and duty of highway officers as regards location or routes of roads to be constructed or improved. 91 ALR 242.

Interest on damages for injury by change of grade for period before judgment. 111 ALR 1307.

Prohibition to control administrative officers in matters relating to highways and streets. 115 ALR 23.

Officers' failure to maintain highways in proper condition as neglect of duty punishable as an offense. 134 ALR 1256.

Deeds for public street or highway purposes as conveying fee or easement. 136 ALR 393.

Deduction of benefit in determining compensation or damages in eminent domain. 145 ALR 7.

Increment to value from projects for which land is condemned, as a factor in fixing compensation. 147 ALR 66.

What physical construction amounts to change of grade within statute relating to award of damages. 156 ALR 416.

Condemner's waiver, surrender or limitation, after award, of rights or part of property acquired by condemnation. 5 ALR 2d 724.

Promissory statements of condemner as to character of use or undertakings to be performed by it, extent of rights acquired by taking as affected by. 7 ALR 2d 364.

Condemner's acquisition of, or right to, minerals under land taken in eminent domain. 36 ALR 2d 1424.

DECISIONS UNDER FORMER LAW**"Cannot be Acquired by Purchase" Defined**

The provision of this section, authorizing the state highway commission to condemn land for highway purposes if it cannot be acquired by purchase, contem-

plates no more than a fair effort to negotiate an agreement; it does not mean that the right of way cannot be bought at any price. *State et al. v. Whitcomb et al.*, 94 M 415, 424, 22 P 2d 823.

32-1615.1. Compensation for irrigable lands rendered unusable. Whenever the state highway commission constructs a highway through an irrigation or drainage project or district and acquires under eminent domain, or otherwise, irrigable land for highway purposes, or so acquires land for such purposes which acquisition renders other irrigable land unusable for irrigation, the state highway commission shall pay to the owner of the irrigation or drainage project, or to the irrigation or drainage district, in addition to any other sums allowed by law, a proportionate share of the unpaid construction costs of the project or the district, if any, for the irrigable land so acquired, or such irrigable land rendered unusable for irrigation.

History: En. Sec. 1, Ch. 182, L. 1961.

32-1616. Highway commission may sell or trade lands when and how, personal property and printed matter. (a) The state highway commission of the state of Montana shall have the power to sell any interest in real estate, however acquired, by its state highway commission, belonging to the state of Montana and which is not necessary to the laying out, altering, construction, improvement or maintenance of any state highway. If the property sought to be sold is reasonably of a value in excess of one hundred dollars (\$100.00), the sale shall be to the highest bidder at public auction or by sealed bids to the discretion of the highway commission, at the office of the state highway commission, highway building in the city of Helena, Montana, after previous notice given by publication in a newspaper published in the county in which said real estate is situated, notice to be published once a week for two (2) successive weeks. Provided, however, the landowner from whom such land had been originally acquired by the state, or his successor in interest, shall have the option to purchase such land by offering therefor an amount of money equal to the highest bid received for such land. Such offer must be sent to the state highway commission by registered mail within ten (10) days from the date of such sale and such sale shall be for cash, lawful money of the United States. In all sales in property of a value in excess of one hundred dollars (\$100.00) there must, before any sale, be an appraisal thereof by the highway commission and at a price representing a fair market value of such property and such appraised value shall be stated in the notice of sale. No sale shall be made of any property unless it has been appraised within three (3) months prior to the date of sale and no such sale shall be made for less than ninety per cent (90%) of the appraised value. If no bid or offer is made for any property offered for sale after appraisal and notice given as provided herein, the highway commission may at any time thereafter sell such property at private sale and may on such private sale accept as the purchase price therefor an amount not less than ninety per cent (90%) of the appraised value thereof. No title to any property sold under the provision thereof shall pass from the state of Montana until the purchaser shall have paid the full amount of the purchase price therefor into the state treasury to the credit of the state highway fund. Provided, however, that whenever the state highway commission determines that any real property or any interest therein which is owned by the state through its state high-

way commission, however acquired, is no longer necessary to the laying out, altering, construction, improvement or maintenance of any state highway, the highway commission may exchange such real property or any interest therein, either as whole or partial consideration, for any other real property or interest therein needed for highway purposes, in the manner and upon the terms and conditions approved by the highway commission. Provided further, that the landowner from whom such land had been originally acquired by the state, or his successor in interest, shall have the right to require the state highway commission to offer such land for sale upon the same terms and conditions hereinbefore set out. The state highway commission must notify such landowner or successor in interest of its intention to exchange such real property and such landowner or successor in interest must make his demand for sale upon the state highway commission by registered mail within ten (10) days after receipt of such notice of intention to exchange.

(b) The state highway commission shall further have the power to sell at public or private sale, to be determined by the commission, any interest in personal property however acquired by the state highway commission, and belonging to the state of Montana, and which is not necessary to the laying out, altering, construction, improvement or maintenance of any state highway or the administration thereof.

(c) The highway commission shall also have the power to sell at public or private sale, maps, books, pamphlets or other printed matter prepared, or acquired, by the highway commission, and copies of any highway records to the public, and is authorized to set a reasonable price therefor.

The proceeds from each such sale shall be paid into the state treasury to the credit of the state highway fund.

History: En. Sec. 1, Ch. 92, L. 1939;
amd. Sec. 1, Ch. 210, L. 1959.

Collateral References

Highways \Rightarrow 95(1).
39 C.J.S. Highways § 157.

32-1617. Execution and contents of deed. The governor, and in case of his absence or inability, the lieutenant governor, shall be, and is hereby authorized to execute deed or patent of conveyance transferring without covenants any and all lands sold by the state highway commission under the laws of this state when full payment has been made therefor. Such deed or patent shall contain the reservation of easements for rights of way to the United States, and all other reservations to which the particular land conveyed may be subject. Such deed or patent shall be attested by the secretary of state, and have the great seal of the state of Montana thereto attached, but need not be acknowledged.

History: En. Sec. 2, Ch. 92, L. 1939.

32-1618. (1798) Prosecution for violation of highway law. The state highway commission shall have power, and it shall be its duty, to prosecute all persons guilty of any violation of "The General Highway Law."

History: En. Sec. 16, Ch. 10, Ex. L.
1921; re-en. Sec. 1798, R. C. M. 1921.

References

Gary Hay & Grain Co., Inc. v. Carlson,

79 M 111, 255 P 722; State ex rel. McMaster v. District Court, 80 M 228, 260 P 134; State et al. v. Hoblitt et al., 87 M 403, 288 P 181; Arps v. State Highway Commission, 90 M 152, 300 P 549; Coldwater v. State Highway Commission, 118 M 65, 162 P 2d 772, 774.

Collateral References

Highways 164, 186.
40 C.J.S. Highways §§ 231, 247.

32-1619. (1799) State highway fund and trust fund. For the purpose of carrying out the provisions of this act, there is hereby created a state highway fund and a state highway trust fund. The state highway fund shall be credited with all moneys received for the use and purpose of the state highway commission from the receipt or transfer of motor vehicle license fees, as provided by law, or from other sources except as herein provided. The state highway trust fund shall be credited with all moneys received from the counties, and from the federal government or other agencies for expenditure by the commission in connection with the actual construction of specific projects. All moneys in the hands of any state officer on the first day of April, 1921, shall be segregated by such state officer and credited to the respective fund to which it properly belongs as above defined. Hereafter all moneys collected for the state highway fund or the state highway trust fund as authorized by law shall be credited to such fund or funds by the state treasurer; provided, however, that nothing herein contained shall prevent the state highway commission from recovering from the state highway trust fund moneys deposited or paid into such trust fund by counties and the federal government or other agencies, to defray the cost of engineering incident to the construction, supervision and inspection of projects carried on under the direction of the commission.

History: En. Sec. 17, Ch. 10, Ex. L. 1921; re-en. Sec. 1799, R. C. M. 1921.

Use of Funds

While the state highway commission may not use the funds in the state highway trust fund created by this section, into which fund go the moneys received from the federal government for federal aid projects, for the acquisition of rights of way for contemplated state highways, it may properly use the funds in the state highway fund, created by the same section, into which flow all moneys col-

lected under the gasoline license tax. State ex rel. McMaster v. District Court, 80 M 228, 237, 260 P 134.

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 255 P 722; State ex el. McMaster v. District Court, 80 M 228, 260 P 134; State et al. v. Hoblitt et al., 87 M 403, 288 P 181; Arps v. State Highway Commission, 90 M 152, 300 P 549; Wheeler v. Mitchell, 110 M 385, 388, 101 P 2d 1071; Coldwater v. State Highway Commission, 118 M 65, 162 P 2d 772, 774.

32-1620. (1800) Presentation and payment of claims. All accounts and expenditures shall be certified by the state highway engineer, and paid by the state treasurer upon warrants drawn by the state auditor out of the proper funds created by this act. In submitting claims for payment as herein provided, the state highway commission shall certify whether the warrant is to be drawn against the state highway fund or the state highway trust fund, and if the claim is against the state highway trust fund, it shall state the particular project to which the payment will apply. The state treasurer is hereby authorized to receive all warrants drawn by the United States government in accordance with the provisions

of any act of Congress, and to credit the same to the state highway trust fund.

The state highway commission shall provide a system of accounting for each project considered which shall show the amount of money received therefor, and also an itemized statement of the expenses in connection therewith.

History: En. Sec. 18, Ch. 10, Ex. L. 1921; re-en. Sec. 1800, R. C. M. 1921; amd. Sec. 7, Ch. 86, L. 1945; amd. Sec. 18, Ch. 97, L. 1961.

State Board of Examiners Not to Contract for Insurance of Bridges

The board of examiners had no authority to enter into a contract for the insurance of all bridges in the state, which are a component part of the state highways and under the control of the state highway commission, the premium to be paid out of the state highway fund; if such a contract is to be made it is to be initiated by the highway commission, though, under the Constitution, Art. VII, Sec. 20, and statutes, any claim arising

therefrom, must be examined by the state board of examiners. *Wheeler v. Mitchell*, 110 M 385, 387, 101 P 2d 1071.

References

Gary Hay & Grain Co., Inc. v. Carlson, 79 M 111, 255 P 722; *State ex rel. McMaster v. District Court*, 80 M 228, 260 P 134; *State et al. v. Hoblitt et al.*, 87 M 403, 288 P 181; *Arps v. State Highway Commission*, 90 M 152, 300 P 549; *Coldwater v. State Highway Commission*, 118 M 65, 162 P 2d 772, 774.

Collateral References

Highways \approx 99 $\frac{1}{4}$; States \approx 123.
40 C.J.S. Highways §176; 81 C.J.S. States §159.

32-1621. Unconstitutional.

Unconstitutional

This section (Laws 1949, Ch. 51), authorizing the expenditure of state highway funds on toll bridges crossing any river in the state, was declared unconstitutional in *Sjostrum v. State Highway Commission*, 124 M 562, 228 P 2d 238.

This section (Laws 1949, Ch. 51) was a local and special law since the only toll bridge crossing a river in the state is the

Great Northern Railway bridge at Snowden owned and operated by such railroad and the state is prohibited by Const. Art. V, Sec. 26 from using highway funds for the construction, reconstruction, betterment, maintenance, administration or engineering thereof. *Sjostrum v. State Highway Commission*, 124 M 562, 228 P 2d 238.

32-1622. Authority for agreements to study, analyze, or test the effects of weights on highways. The state highway commission is authorized to make and enter into agreements with the federal government or any state or group of states, or agencies thereof, or any nonprofit association, on a joint or co-operative basis, to study, analyze, or test the effects of weights on highway construction. Such studies or tests may be made either by designating existing highway or the construction of test strips, including natural resource roads, to the end that a proper solution of the many problems connected with the imposition on highways of motor vehicle weights may be determined.

Such studies may determine the determination of values to be assigned various highway-user groups according to their gross weight or use.

History: En. Sec. 1, Ch. 15, L. 1955.

32-1623. Designation of highways not located entirely and continuously within state as state highways—conditions. The state highway commission is hereby authorized to designate such public roads as shall be classed as state highways and subject to improvements under the provisions of the Federal Aid Road Act of Congress, approved July 11, 1916, and all other

acts granting aid for public highways, even though such road or highway is not located entirely and continuously within the boundaries of the state of Montana. The designation of such roads or highways shall meet the following conditions:

(1) That it shall be on an approved federal aid route and eligible for improvement under the federal aid highway acts;

(2) That the location of a portion of such route outside the boundaries of the state of Montana is necessary because of natural geographical or physical conditions which make the construction of the highway within the state of Montana impossible or impracticable;

(3) That the portion of such route located outside the state of Montana does not connect with and is not a part of the state highway system of the adjoining state.

History: En. Sec. 1, Ch. 30, L. 1955.

32-1624. Powers regarding such highways. The state highway commission is authorized to do all things necessary or required to carry out fully the co-operation contemplated under the federal aid highway acts with regard to such roads and to expend funds for the construction, reconstruction, engineering, administration, betterment and maintenance thereof.

History: En. Sec. 2, Ch. 30, L. 1955.

32-1625. Facilities of utilities — relocation — cost — definitions. (a) The state highway commission shall have the power and authority to make and publish after appropriate hearings reasonable regulations for the installation, construction, maintenance, repair, renewal and relocation of tracks, pipes, mains, conduits, cables, wires, towers, poles and other equipment and appliances (herein called "facilities") of any utility in, on, along, over, across, through or under any project on (1) the Federal-Aid Primary System, or (2) the Federal-Aid Secondary System, or on (3) the Interstate System, including extensions thereof within urban areas. Whenever the commission shall determine, after written notice supplied to all concerned not less than twenty (20) days in advance of hearing and fair, public hearing at the time and place noticed for hearing (unless hearing is waived by the utility or other interested parties in writing), that it is necessary that any such facilities which now are, or hereafter may be, located in, on, along, over, across, through or under any such Federal-Aid Primary System, Federal-Aid Secondary System, or on the Interstate System, including extensions thereof within urban areas, should be relocated, the utility owning or operating such facilities shall relocate the same in accordance with the valid order of the commission, and seventy-five per cent (75%) of all costs of relocation, including acquisition of new right of way, dismantling, and removal, shall be paid by the state of Montana through the state highway commission. In case of any such relocation of facilities, as aforesaid, the public utility owning or operating the same, its successors or assigns, may maintain and operate such facilities, with the necessary appurtenances, in the new location or new locations.

(b) Definitions. For the purposes of this section:

The term "utility" shall include publicly, privately and co-operatively owned utilities.

The term "cost of relocation" shall include the entire amount paid by such utility properly attributable to such relocation after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility; and,

The term "Interstate System" means any highway now included or which shall hereafter be included as a part of the National System of Interstate and Defense Highways, as provided in the Federal-Aid Highway Act of 1956, and any acts supplemental thereto or amendatory thereof.

(c) The cost of relocating utility facilities in connection with any project on the Federal-Aid Primary System or Federal-Aid Secondary System or on the Interstate System is hereby declared to be a cost of highway construction.

History: En. 32-1625 by Sec. 1, Ch. 254,
L. 1957.

Constitutionality

This section is constitutional. *Jones v. Burns*, — M —, 357 P 2d 22, 33, 34, 35, 36.

32-1626. Lewis and Clark highway—routes comprising. There is hereby established the Lewis and Clark highway, which shall be composed of the following existing routes: Beginning at the junction of highway ninety-three (93) in Lolo, Montana, to Lolo Hot Springs, Montana, to the Idaho-Montana state line.

History: En. Sec. 1, Ch. 204, L. 1961.

CHAPTER 17

NATIONAL DEFENSE HIGHWAY PROGRAM

- Section 32-1701. State highway traffic advisory committee abolished—transfer of powers and duties.
 32-1702. Powers and duties.
 32-1703. Highway safety and driver training program.
 32-1704. Repealed.
 32-1705. Repealed.

32-1701. State highway traffic advisory committee abolished—transfer of powers and duties. The state highway traffic advisory committee is hereby abolished and the records, duties and powers of said committee are hereby transferred to the director of the civil defense agency (hereinafter referred to as the director).

History: En. Sec. 1, Ch. 82, L. 1941;
amd. Sec. 2, Ch. 94, L. 1953.

32-1702. Powers and duties. The said director is hereby vested with the following powers and duties:

(a) To co-operate with the agencies of this and other states and of the federal government which are connected with national defense, in the formulation and execution of plans for the rapid and safe movement over the highways of troops, vehicles of a military nature, and materials affecting the national defense.

(b) To co-ordinate the activities of the Montana highway commission, the Montana highway patrol, and the registrar of motor vehicles in a manner which will best serve to effectuate any such plan for the rapid and safe movement of troops, vehicles and materials as referred to in paragraph (a) of this section.

(c) To solicit the co-operation of officials of the various political subdivisions of the state in the proper execution of such plans.

(d) To take an inventory, by counties, of the trucks and buses in the state, publicly and privately owned, which would be available in case of emergency affecting the national defense.

History: En. Sec. 2, Ch. 82, L. 1941;
amd. Sec. 3, Ch. 94, L. 1953.

32-1703. Highway safety and driver training program. The director may, in conjunction with any interested public or private agencies, conduct a highway safety and driver training program as an aid to the national defense.

History: En. Sec. 3, Ch. 82, L. 1941;
amd. Sec. 4, Ch. 94, L. 1953.

32-1704, 32-1705. Repealed—Chapter 94, Laws of 1953.

Repeal

These sections (Secs. 4, 5, Ch. 82, L. 1941), relating to the compensation of members of the state highway traffic ad-

visory committee and their employees, were repealed by Sec. 1, Ch. 94, Laws 1953.

CHAPTER 18

STOCK LANE LAW

- Section 32-1801. Stock lane law.
32-1802. Stock lane defined.
32-1803. Laws applicable to stock lanes.
32-1804. Power of county commissioners exclusive.

32-1801. Stock lane law. This act shall be known as the "Stock Lane Law."

History: En. Sec. 1, Ch. 63, L. 1939.

32-1802. Stock lane defined. Within the meaning of this act a stock lane shall be deemed to be a public highway established and maintained for the driving of and travel of livestock thereon. The width of such highway shall be determined by the order or orders of the county commissioners creating the same and shall be not less than sixty (60) feet in width.

History: En. Sec. 2, Ch. 63, L. 1939.

Collateral References

Highways \Rightarrow 18.
39 C.J.S. Highways § 1.

32-1803. Laws applicable to stock lanes. The provisions of sections 32-401 to 32-417, and the general laws of this state relating to the establishing, altering and vacating of public highways including the right of exercise of the power of eminent domain shall likewise apply to stock

lanes except that such highways in all petitions, orders and proceedings shall be referred to as "stock lanes" to differentiate them from other highways.

History: En. Sec. 3, Ch. 63, L. 1939.

32-1804. Power of county commissioners exclusive. The power to establish, alter or vacate stock lanes shall belong exclusively to the county commissioners of the respective counties, to be exercised when they deem it expedient and necessary for the convenience of the public, and when they deem it to be for the convenience of the travel of the public on highways now established. Any such lane established may adjoin and parallel a public highway and shall be described in the petition for the creation of and the order of the county commissioners creating the same.

History: En. Sec. 4, Ch. 63, L. 1939.

Collateral References

Highways \Rightarrow 23.

39 C.J.S. Highways § 39.

CHAPTER 19

MONTANA TOLL BRIDGE AUTHORITY

- Section 32-1901. Definitions.
 32-1902. Creation of authority—members—salary—officers—seal.
 32-1903. Powers.
 32-1904. Estimates of costs—limitations on placing of toll bridges—petitions, contents.
 32-1905. Bond issues, nature, maturity, interest, contents—registration—sale.
 32-1906. Use of money received from bond issue—liens.
 32-1907. Powers of authority in connection with bond issues.
 32-1908. Fixing of toll charges—expiration of toll charges.
 32-1909. Construction fund—revenue fund—sinking fund.
 32-1910. Construction fund—disposition of surplus.
 32-1911. Sinking fund.
 32-1912. State highway engineer, duties—revenue fund.
 32-1913. Records—annual statement—transfer of proceeds from revenue fund to sinking fund.
 32-1914. Rights of way—eminent domain.
 32-1915. Limitations on building bridges near toll bridge.

32-1901. Definitions. As used in this act, the terms, "Montana toll bridge authority" and "authority" shall be used interchangeably, and shall mean the Montana toll bridge authority created by this act; and "toll bridge" shall mean any bridge constructed under the provisions of this act, upon which tolls will be charged as hereinafter provided, together with all appurtenances and additions, alterations or improvements thereto or replacements thereof, and the approaches thereto, and all lands used therefore and improvements thereon.

History: En. Sec. 1, Ch. 31, L. 1953.

Collateral References

Bridges \Rightarrow 7.

11 C.J.S. Bridges § 10.

Constitutionality

The Montana supreme court refused to pass upon the constitutionality of this act (secs. 32-1901 to 32-1915) on the ground that plaintiffs failed to show they would be adversely affected by its operation. *Monarch Mining Co. et al. v. State Highway Commission*, 128 M 65, 270 P 2d 738.

Liability for negligence of public body or political subdivision operating toll bridge. 43 ALR 2d 550.

Liability, in negligence action, of state highway or turnpike authority. 62 ALR 2d 1222.

32-1902. Creation of authority — members — salary — officers — seal. There is hereby created an authority to be known as the Montana toll bridge authority, which shall be composed of the members of the state highway commission. In addition to the powers and duties heretofore conferred on them the members of said state highway commission shall, as members of the Montana toll bridge authority, have the powers and perform the duties provided for in this act. All members of the authority shall serve without compensation other than that received as members of the state highway commission. The expense of any surveys and reports, paid from the funds of the state highway commission, shall be deemed fully repaid when such toll bridge becomes a free public bridge as provided in section 32-1908. The chairman of the state highway commission shall be the chairman of said authority and the state highway engineer shall be the secretary-treasurer thereof. The authority is authorized to adopt rules and regulations for its own government and for the administration of this act and the execution of the powers and duties hereby conferred. All contracts, bonds and other instruments of the authority shall be executed in the name of Montana toll bridge authority by its chairman and attested by its secretary-treasurer. The authority shall have and adopt a seal bearing its name which shall be affixed to such bonds, instruments and records as the authority or its chairman may direct.

History: En. Sec. 2, Ch. 31, L. 1953.

32-1903. Powers. The Montana toll bridge authority is empowered to establish and construct a toll bridge or toll bridges upon any of the public highways of this state, together with approaches thereto, wherever the same shall be found and determined to be necessary, advantageous and practicable for crossing any stream or body of water within this state.

History: En. Sec. 3, Ch. 31, L. 1953.

32-1904. Estimates of costs—limitations on placing of toll bridges—petitions, contents. (1) Whenever the Montana toll bridge authority shall find and determine that the construction of any toll bridge is necessary, advantageous and practicable, it shall adopt a resolution making such finding and determination and declaring that public convenience and necessity require the construction of such toll bridge, which resolution shall contain a preliminary estimate of the cost of such construction and of the amount to be raised for such purpose by the issuance of revenue bonds, and a statement of the probable amount of money, property, materials or labor, if any, to be contributed from other sources in aid of any such construction. The authority shall also make estimates of the cost of such toll bridge, and of the cost of maintaining, repairing and operating the same, and of the revenues to be derived therefrom, and no such toll bridge shall be constructed hereunder unless said authority shall first find and determine that the probable revenues to be derived therefrom will be sufficient to pay the cost of maintaining, repairing and operating such toll bridge, and to pay the principal and interest on revenue bonds issued to provide funds with which to pay the cost thereof; provided, however, that in connection with the issuance of any such bonds, the failure of the authority to make the

estimates required by this section or to make the same in proper form shall in no way affect the validity or enforceability of any such bonds.

(2) No toll bridge shall be authorized or constructed over or across any stream within a radius of fifty (50) miles on either side of any free public bridge now existing upon said stream, unless and until there shall first have been filed with the authority a petition requesting the construction of such toll bridge, signed by not less than twenty (20%) per cent of the taxpaying freeholders whose names appear on the last completed assessment roll of the county wherein such toll bridge is proposed to be constructed, or, if the same is to be located upon a stream at a point where such stream constitutes the boundary between two (2) counties, then such petition shall be signed by not less than twenty (20%) per cent of the taxpaying freeholders whose names appear on the last completed assessment roll of both of said counties.

(3) Such petition or petitions shall contain a statement showing the location of the proposed toll bridge and the location of all free public bridges existing upon the same stream within a radius of fifty (50) miles of such proposed toll bridge, and shall further contain a concise statement of facts showing that the construction of such toll bridge is necessary, advantageous and practicable. Several petitions identical in form may be circulated, and after being signed there shall be attached thereto an affidavit of the person circulating the same to the effect that the signatures are genuine and that the signers knew the contents thereof at the time of signing the same. All petitions from each county shall be attached together so as to form a single petition before being filed with the authority, and such petition shall have attached thereto a certificate of the county clerk and recorder showing whether or not the same has been signed by twenty (20%) per cent or more of the taxpaying freeholders whose names appear on the last completed assessment roll of such county, and such petition shall thereupon be transmitted by said county clerk and recorder to the authority. The members of the authority shall meet and consider such petition within thirty (30) days after the filing thereof. The authority shall be the sole judge of the sufficiency of the petition and its findings shall be conclusive in favor of the innocent holder of bonds issued by reason of the presentation of such petition. If it is found that the petition bears the requisite number of signatures and is in proper form, and if the authority shall further find and determine that the construction of the proposed toll bridge is necessary, advantageous and practicable, the authority shall adopt a resolution making such finding and determination and containing the estimates and data hereinbefore provided for in subsection one (1) of this section.

History: En. Sec. 4, Ch. 31, L. 1953.

32-1905. Bond issues, nature, maturity, interest, contents—registration—sale. (1) The authority is hereby authorized to provide by resolution, at one time or from time to time, for the issuance of toll bridge revenue bonds for the purpose of paying the cost of any toll bridge. The principal and interest of such bonds shall be payable solely from the special fund herein provided for such payment, and such bonds shall not be a debt,

liability or obligation of the state of Montana, and shall be secured only by the revenues from the toll bridge or toll bridges constructed by virtue of this act. Said bonds shall mature at such time or times, not more than twenty (20) years from their date or dates, as may be fixed by such resolution, but may be made redeemable before maturity at the option of the authority at such price or prices and under such terms and conditions as may be fixed by the authority prior to the issuance of the bonds. The authority shall determine the rate of interest such bonds shall bear, not exceeding six (6%) per centum per annum, the time or times of payment of such interest, the form of the bonds and the interest coupons to be attached thereto, and the manner of executing the bonds and coupons, and shall fix the denomination or denominations of the bonds and the place or places of payment of principal and interest thereof, which may be at any bank or trust company within or without the state.

(2) All bonds issued under this act shall contain a statement on the face thereof that the state shall not be obligated to pay the same or the interest thereon except from the special fund hereinafter provided for. In case any of the officers whose signatures appear on the bonds or coupons shall cease to be such officers before the delivery of such bonds, such signatures shall nevertheless be valid and sufficient for all purposes with the same effect as though they had remained in office until such delivery. All such bonds shall be negotiable instruments and shall have and are hereby declared to have all the qualities and incidents of negotiable instruments under the negotiable instruments law of the state.

(3) Provisions may be made for the registration of any of such bonds in the name of the owner as to principal alone or as to both principal and interest. The bonds authorized under the provisions of this act may be issued and sold from time to time, in such amounts as shall be determined by the authority, and the authority may sell said bonds in such manner and for such price, as it may determine to be for the best interests of the state, but no such sale shall be made for less than a price which, computed with relation to the absolute maturity of the bonds in accordance with standard tables of bond values, will show a net return of six (6%) per centum per annum to the purchaser upon the amount paid therefor. The proceeds of such bonds shall be used solely for the payment of the cost of any toll bridge constructed hereunder, and the proceeds of such bonds shall be disbursed in such manner and under such restrictions as the authority may provide.

(4) If the proceeds of such bonds, by error of calculation or otherwise, shall be less than the cost of any toll bridge, additional bonds may in like manner be issued to provide the amount of such deficit and, unless otherwise provided in the resolution authorizing the bonds, shall be deemed to be of the same issue and shall be entitled to payment from the same fund, and shall be of equal preference and priority as the bonds first issued for the same toll bridge. If the proceeds of the bonds issued for any such toll bridge shall exceed the cost thereof, the surplus shall be paid into the fund hereinafter provided for the payment of principal and interest of such bonds. Prior to the preparation of definitive bonds, the authority

may under like restrictions issue temporary bonds with or without coupons, exchangeable for definitive bonds when such bonds have been executed and are available for delivery.

(5) Each resolution providing for the issuance of bonds shall set forth and identify the toll bridge for which the bonds are to be issued, and the bonds authorized by each such resolution shall constitute a separate series. The bonds of each series shall be identified by a series letter or letters, and may be sold and delivered at one time or from time to time.

History: En. Sec. 5, Ch. 31, L. 1953.

Collateral References

States \hookleftarrow 152.

81 C.J.S. States § 182.

32-1906. Use of money received from bond issue—liens. All moneys received from any bonds issued pursuant to this act shall be applied solely to the payment of the cost of the toll bridge for the payment of which such bonds were issued, and there shall be and hereby is created and granted a lien upon such moneys until so applied, in favor of the holders of such bonds.

History: En. Sec. 6, Ch. 31, L. 1953.

32-1907. Powers of authority in connection with bond issues. In connection with the issuance and in order to secure the payment of such bonds, the authority shall have power:

(a) To pledge all or any part of the tolls, income, profit and revenue of any such toll bridge, and to covenant to pay such tolls, income, profit and revenue into the appropriate fund therefor.

(b) To covenant to fix and establish such tolls, rates and charges as will provide at all times sufficient funds (1) to pay all costs of operation and maintenance of such toll bridge together with necessary repairs thereto, and (2) to meet and pay the principal and interest of all such bonds as they severally become due and payable, and (3) to create such reserves for the principal and interest of all such bonds and to meet contingencies in the operation and maintenance of such toll bridge as the authority shall determine; and to make such further covenants as to such tolls, rates and charges as the authority shall deem necessary to secure the payment of such bonds; provided that no truck, trailer or automobile licensed in the name of the state of Montana or the federal government or any branch or department thereof, shall be required to pay any toll for the crossing of any such toll bridge.

(c) To create a special fund or funds, in addition to those required by this act, for moneys reserved for principal and interest on bonds and for meeting contingencies in the operation and maintenance of any such toll bridge and to determine the depository or depositories in which such funds shall be deposited and the manner in which such deposits shall be secured, and it shall be lawful for any bank or trust company incorporated under the laws of this state to act as such depository and to furnish such indemnifying bonds or to pledge such securities as may be required by the authority.

(d) To provide for the replacement of lost, destroyed or mutilated bonds.

(e) To covenant against extending the time for the payment of the principal of or interest on any of such bonds, directly or indirectly by any means or in any manner.

(f) To prescribe and covenant as to the events of default and terms and conditions upon which any or all of such bonds shall become or may be declared due before maturity and as to the terms and conditions upon which such declaration and its consequences may be waived.

(g) To covenant as to the rights, liabilities, powers and duties arising upon the breach of any covenant, condition or obligation.

(h) To vest in a trustee or trustees the right to enforce any covenant made to secure or to pay such bonds, to provide for the powers and duties of such trustee or trustees, to limit the liabilities thereof, and to provide the terms and conditions upon which the trustee or trustees or the holders or any proportion of them may enforce any such covenant.

(i) To make such covenants and do any and all such acts and things as may be necessary or convenient or desirable in order to secure such bonds or to make such bonds more marketable, notwithstanding that such covenants, acts or things may not be enumerated or expressly authorized herein, it being intended to grant unto the authority power to do all things in the issuance of such bonds and in providing for their security that may not be inconsistent with the constitution of Montana.

History: En. Sec. 7, Ch. 31, L. 1953.

32-1908. Fixing of toll charges—expiration of toll charges. The authority is hereby empowered to fix the rates of toll and other charges for all toll bridges built under the terms of this act, and from time to time to change such rates of toll and other charges. Such tolls and charges shall at all times be fixed at rates to yield annual revenue equal to annual operating and maintenance expenses and to redeem and pay the principal and interest of all bonds as they severally become due and to create such reserves as the authority shall deem necessary; and such tolls and revenues shall constitute a trust fund for the security and payment of such bonds and shall not be pledged for any other purpose as long as such bonds or any of them are outstanding and unpaid. Whenever the toll bridge revenue bonds issued for the purpose of paying the cost of any toll bridge shall have been retired and the cost of construction of such toll bridge shall thereby have been repaid in full, such bridge thereafter shall be maintained and operated by the state highway commission as a free bridge.

History: En. Sec. 8, Ch. 31, L. 1953.

32-1909. Construction fund—revenue fund—sinking fund. The authority shall create three (3) separate funds in respect of the bonds of each series issued by the authority, one (1) fund to be known as the "toll bridge construction fund, series" another fund to be known as the "toll bridge revenue fund, series" and another fund to be known as the "toll bridge sinking fund, series" each such fund to be identified by the same series letter or letters as the bonds of such series. The moneys in each such fund shall be deposited in such depository or depositories and secured in such manner as may be determined by the

authority. It shall be lawful for any bank or trust company incorporated under the laws of this state to act as such depository and to furnish such indemnifying bonds or to pledge such securities as may be required by the authority.

History: En. Sec. 9, Ch. 31, L. 1953.

32-1910. Construction fund—disposition of surplus. The proceeds of the bonds of each series issued under the provisions of this act shall be placed to the credit of the appropriate construction fund, which fund shall at all times be kept segregated and set apart from all other funds. There shall also be credited to the appropriate construction fund all accrued interest upon the bonds and the interest received upon the deposits of moneys in such fund and moneys received by grant or donation from the United States or from any other source for the construction of such toll bridge. The moneys in each construction fund shall be disbursed in such manner as may be determined by the authority, subject to the provisions of this act, to pay the cost of the toll bridge for which such fund was created. Any surplus which may remain in any construction fund after providing for the payment of the cost of such toll bridge shall be added to and become a part of the appropriate sinking fund hereinafter provided for.

History: En. Sec. 10, Ch. 31, L. 1953.

32-1911. Sinking fund. The authority shall provide, in the proceedings authorizing the issuance of each series of bonds, for paying into the appropriate sinking fund at stated intervals all moneys then remaining in the toll bridge revenue fund after paying all costs of operation, maintenance and repair of the toll bridge with respect of which such revenue fund was created. All moneys in each sinking fund shall be pledged for the payment of and used only for the purpose of paying (a) the interest upon the bonds as such interest shall fall due, and (b) the necessary fiscal agency charges for paying bonds and interest, and (c) the principal of the bonds as they fall due, and (d) any premiums upon bonds retired by call or purchase as herein provided. Prior to the issuance of the bonds of each series the authority may provide by resolution for using the sinking fund or any part thereof in the purchase of any of the outstanding bonds payable therefrom, at the market price thereof, but not exceeding the price, if any, at which the same shall at the next interest date be payable or redeemable, and all bonds redeemed or purchased shall forthwith be canceled and no bonds shall be issued in place thereof. The moneys in each sinking fund, less such reserve as may be provided for the payment of principal and interest in the resolution authorizing the bonds, if not used within a reasonable time for the purchase of bonds for cancellation as above provided, shall be applied to the redemption of bonds then subject to redemption at the redemption price then applicable.

History: En. Sec. 11, Ch. 31, L. 1953.

32-1912. State highway engineer, duties—revenue fund. The state highway engineer shall have full charge of the construction of all toll bridges that may be authorized by the Montana toll bridge authority,

and shall have full charge of the operation and maintenance thereof, and, under the supervision of said authority and subject to its rules and regulations said state highway engineer shall have charge of the collection of all tolls, which tolls shall be deposited to the credit of the respective toll bridge revenue fund designated by the authority.

Whenever funds are available for the construction of any toll bridge hereunder, the state highway engineer shall proceed with the construction thereof, but all contracts for such construction shall be let by the state highway commission by competitive bidding, after such notice and upon such terms as it shall prescribe by its rules and regulations.

History: En. Sec. 12, Ch. 31, L. 1953.

32-1913. Records—annual statement—transfer of proceeds from revenue fund to sinking fund. The state highway engineer shall keep full and complete accounts relating to each toll bridge constructed hereunder, and shall annually cause to be prepared and filed in the office of the secretary of state a balance sheet and income and profit and loss statement showing the financial condition of each toll bridge. All books, records and papers pertaining to any toll bridge shall at all reasonable times be open to the inspection of any citizen of the state.

The moneys remaining in each separate toll bridge revenue fund after providing the amount required for interest and redemption of bonds as hereinbefore provided, shall be held and applied in accordance with the proceedings relating to the authorization of such bonds.

The authority shall make and adopt rules and regulations regarding the collection of tolls and the deposit thereof to the credit of the appropriate toll bridge revenue fund, and the transfer therefrom to the appropriate toll bridge sinking fund of moneys for the payment and redemption of bonds as they severally mature.

History: En. Sec. 13, Ch. 31, L. 1953.

32-1914. Rights of way—eminent domain. The Montana toll bridge authority shall have power and authority to acquire by purchase or otherwise, necessary rights of way for any toll bridge and the approaches thereto, and it may exercise the power of eminent domain in the name of the state for said purpose.

Whenever it shall be deemed necessary by the authority to secure any right of way as herein provided, and the same cannot be acquired by purchase, the authority may direct the attorney general or any county attorney in any county wherein such right of way is situated, to procure such right of way by proceedings to be instituted as provided in sections 93-9901 to 93-9926 against all nonaccepting landholders.

A right of way is hereby given, dedicated and set apart for toll bridges and approaches thereto, through, over, upon or across any property of this state, including highways, and through, over, upon or across any county road and any street or alley, and the acquisition and use thereof as herein provided shall be deemed superior and a more necessary public

use and purpose than the public use or purpose to which such highway, road, street or alley has theretofore been dedicated.

History: En. Sec. 14, Ch. 31, L. 1953.

other relief for loss of access because of limited access to highway or street. 43 ALR 2d 1072.

Collateral References

Abutting owner's right to damages or

32-1915. Limitations on building bridges near toll bridge. So long as any of the bonds issued hereunder for the construction of any toll bridge are outstanding and unpaid, there shall not be erected, constructed or maintained any other bridge for public use over or across the stream upon which such toll bridge is located within a distance of twenty (20) miles from either side of such toll bridge, excepting bridges actually in existence and being used at the time of the issuance of such bonds.

History: En. Sec. 15, Ch. 31, L. 1953.

CHAPTER 20

CONTROLLED ACCESS HIGHWAYS

- Section 32-2001. Purpose.
 32-2002. Definitions.
 32-2003. Designation as controlled access highway—resolution—findings.
 32-2004. Powers of highway authorities.
 32-2005. Design of controlled access facility—ingress and egress restricted.
 32-2006. Acquisition of property for facility.
 32-2007. New and existing facilities—grade crossing eliminations.
 32-2008. Existing roads and streets as service roads.
 32-2009. Marking of facility with signs.
 32-2009.1. Commercial enterprise or structure.
 32-2010. Violations specified—penalty.

32-2001. Purpose. It is the declared policy of this state to facilitate the flow of traffic and promote public safety by controlling access to highways included by the bureau of public roads in the national system of interstate highways.

History: En. Sec. 1, Ch. 104, L. 1955.

39 C.J.S. Highways § 141.

Collateral References

25 Am. Jur. 448, Highways, § 154.

Highways 85.

32-2002. Definitions. When used in this act:

(a) "Interstate highway" means any highway now included or which shall hereafter be included as a part of the National System of Interstate Highways.

(b) "Controlled access highway" means all portions of an interstate highway which the state highway commission shall determine and designate for through traffic, over, from or to which owners or occupants of abutting land or other persons have no easement of access or only a limited easement of access, light, air or view, by reason of the fact that the property abuts upon such highway, or for any other reason, and shall further include those portions of spurs to the interstate highway system which the state highway commission shall determine and designate as unsafe for or impeded by unrestricted access of traffic from intersecting streets or alleys or public or private roads or ways of passage.

(c) "Controlled access facility" means and includes all streets, alleys, public roads, private roads and ways of passage intersecting any controlled access highway and all real property contiguous to the right of way of any controlled access highway.

(d) "Existing highway" means and includes all highways, roads and streets heretofore established, constructed and in use. It shall not include new highways, roads or streets, or relocated highways, roads or streets, or portions of existing highways, roads or streets which are relocated.

History: En. Sec. 2, Ch. 104, L. 1955;
amd. Sec. 1, Ch. 121, L. 1957.

32-2003. Designation as controlled access highway—resolution—findings. No part or portion of an interstate highway shall be designated as a controlled access highway unless the state highway commission shall, by resolution adopted by the majority vote of the members in attendance at any regular or special meeting thereof, find and determine that it is necessary and/or desirable that the owners or occupants of the abutting land or other persons have no easement of access or only a limited easement of access, light, air or view by reason of the fact that their property abuts upon such highway or for any other reason: It is hereby declared that the requirement by the federal government that access be controlled is necessity for the passing of such resolution by the highway authorities; nor shall any part or portion of any interstate, or spurs to the interstate highway system be designated as a controlled access highway unless the state highway commission shall, by resolution adopted by the majority vote of the members in attendance at any regular or special meeting thereof, find and determine that it is necessary and/or desirable that the rights of, or easements to access, light, air or view be acquired by the state so as to prevent such part or portion of highway from becoming unsafe for or impeded by unrestricted access of traffic from intersecting streets or alleys or public or private roads or ways of passage. Such resolution shall contain a statement of the reasons for the adoption thereof, and shall set forth the location, distance and termini of the portion of the highway designated as a controlled access highway.

History: En. Sec. 3, Ch. 104, L. 1955;
amd. Sec. 2, Ch. 121, L. 1957.

32-2004. Powers of highway authorities. The highway authorities of the state, counties, incorporated cities and towns, having authority to participate in the construction and maintenance of highways, are hereby authorized to plan, designate, establish, regulate, vacate, alter, improve, maintain, and provide controlled access facilities for public use wherever such authority or authorities shall find and determine the necessity or desirability of such controlled access facilities as defined in this chapter. Provided, that within incorporated cities and towns, and upon county roads within counties, such authority or authorities shall be subject to the consent of the governing body. Said highway authorities of the state, counties, incorporated cities and towns, in addition to the specific powers granted in this act, shall also have and may exercise, relative to controlled access facilities, any and all additional authority now or hereafter vested

in them relative to highways or streets within their respective jurisdictions. Said units may regulate, restrict, or prohibit the use of such controlled access facilities by the various classes of vehicles or traffic.

History: En. Sec. 4, Ch. 104, L. 1955;
amd. Sec. 3, Ch. 121, L. 1957.

32-2005. Design of controlled access facility—ingress and egress restricted. The highway authorities of the state, counties, incorporated cities and towns are authorized to so design any controlled access facility and to so regulate, restrict or prohibit access as to best serve the traffic for which such facility is intended. In this connection such highway authorities are authorized to divide and separate any controlled access facility into separate roadways by the construction of raised curbsings, central dividing sections, or other physical separations, or by designating such separate roadways by signs, markers, stripes, and other devices. No person shall have any rights of ingress or egress to, from or across controlled access facilities to or from abutting lands, except at such designated points at which access may be permitted, upon such terms and conditions as may be specified from time to time.

History: En. Sec. 5, Ch. 104, L. 1955.

32-2006. Acquisition of property for facility. For the purpose of this act, the highway authorities of the state, counties, incorporated cities and towns, respectively, or in co-operation one with the other, may acquire private or public property and property rights for controlled access facilities and service roads, including rights of access, air, view, and light, by gift, devise, purchase, or condemnation, in the same manner as such authorities are now or hereafter may be authorized by law to acquire property or property rights in connection with highways and streets within their respective jurisdictions. A right of way is hereby given, dedicated and set apart for controlled access facilities through, over, upon or across any county road and any street or alley intersecting a controlled access highway, and the acquisition of any such county road, street, or alley for use as a controlled access facility shall be deemed superior and a more necessary public use and purpose than the public use or purpose to which such road, street or alley has theretofore been dedicated.

History: En. Sec. 6, Ch. 104, L. 1955.

limited access to highway or street. 43
ALR 2d 1072.

Collateral References

Abutting owner's right to damages or
other relief for loss of access because of

Power to directly regulate or prohibit
abutter's access to street or highway. 73
ALR 2d 652.

32-2007. New and existing facilities—grade crossing eliminations. The state or any of its subdivisions shall have authority to provide for the elimination of intersections at grade of controlled access facilities with existing state and county roads, and city or town streets at the right of way boundary line of such controlled access facility; and after the establishment of any controlled access facility, no highway or street which is not a part of said facility shall intersect the same at grade. No incorporated city or town street, county or state highway, or other public way shall be opened into or connected with any such controlled access

facility without the consent and previous approval of the highway authority in the state, county, incorporated city or town having jurisdiction over such controlled access facility. Provided, however, that the commission may, whenever it determines that traffic is not thereby impeded and that public safety is not thereby impaired, authorize the continued intersection at grade of lightly traveled farm entrances and minor public roads as ways of access to controlled access highways in sparsely populated rural areas.

History: En. Sec. 7, Ch. 104, L. 1955.

32-2008. Existing roads and streets as service roads. In connection with the development of any controlled access facility the state, county, or incorporated city or town highway authorities are authorized to plan, designate, establish, use, regulate, alter, improve, maintain, and vacate local service roads and streets or to designate as local service roads and streets any existing road or street, and to exercise jurisdiction over service roads in the same manner as is authorized over controlled access facilities under the terms of this act, whenever such local service roads are necessary for carrying out any of the provisions of this act. Such local service roads or streets shall be of appropriate design, and shall be separated from the controlled access facility proper by means of all devices determined to be necessary in carrying out the provisions of this act.

History: En. Sec. 8, Ch. 104, L. 1955.

32-2009. Marking of facility with signs. After the opening of any new and additional controlled access facility, or after the designation and establishment of any existing street or highway as included, the particular highways and streets or those portions thereof designated and established, shall be physically marked and indicated by the erection and maintenance of signs indicating to drivers of vehicles that they are entering a controlled access area and that they are leaving a controlled access area.

History: En. Sec. 9, Ch. 104, L. 1955.

32-2009.1. Commercial enterprise or structure. No commercial enterprise or structure can be constructed or operated on the publicly-owned right of way of, or on any publicly-owned or publicly-leased land used for, or in connection with a controlled access facility.

History: En. 32-2009.1 by Sec. 1, Ch. 134, L. 1959.

32-2010. Violations specified—penalty. After the opening of any new and additional controlled access highway facility, or after the designation and establishment of any existing street or highway as included, it shall be unlawful for any person (1) to drive a vehicle over, upon, or across any curb, central dividing section, or other separation or dividing line on controlled access facilities; (2) to make a left turn or a semicircular or U-turn except through an opening provided for that purpose in the dividing curb section, separation, or line; (3) to drive any vehicle except in the proper lane provided for that purpose and in the proper direction and

to the right of the central dividing curb, separation section, or line; (4) to drive any vehicle into the controlled access facility from a local service road except through an opening provided for that purpose in the dividing curb, or dividing section, or dividing line which separates such service road from the controlled access facility proper. Any person who violates any of the provisions of this section shall be guilty of a misdemeanor and upon arrest and conviction therefor shall be punished by a fine of not less than five dollars (\$5.00) nor more than one hundred dollars (\$100.00), or by imprisonment in the city or county jail for not less than five (5) days nor more than ninety (90) days, or by both fine and imprisonment.

History: En. Sec. 10, Ch. 104, L. 1955.

Separability Clause

Section 11 of Ch. 104, Laws 1955 as amended by Sec. 4 of Ch. 121, Laws 1957 read "Severability. If any section, provision, or clause of this act shall be declared invalid or inapplicable to any person or circumstance, such invalidity or inapplicability shall not be construed to affect the portions not so held or persons or cir-

cumstances not so affected. All laws or portions of laws inconsistent with the policy and provisions of this act are hereby repealed to the extent of such inconsistency in its application to controlled access facilities provided for in this act. Provided further that nothing herein contained shall be construed to be in conflict with any federal aid highway act or any amendments to such acts."

CHAPTER 21

UNIFORM ACT REGULATING TRAFFIC ON HIGHWAYS

- Section 32-2101. Definition of words and phrases.
- 32-2102. Definitions—vehicle—motor vehicle—motorcycle—motor-driven cycle—authorized emergency vehicle—school bus—bicycle—special mobile equipment.
- 32-2103. Definitions—truck—tractor—farm tractor—road tractor.
- 32-2104. Definitions—truck—bus—trackless trolley coach.
- 32-2105. Definitions—trailer—semitrailer—pole trailer—house trailer.
- 32-2106. Definitions—pneumatic tire—solid tire—metal tires.
- 32-2107. Definitions—railroad—railroad train.
- 32-2108. Definitions—explosives—flammable liquid.
- 32-2109. Definitions—gross weight.
- 32-2110. Definitions—supervisor—board—commission.
- 32-2111. Definitions—person—pedestrian—driver—owner.
- 32-2112. Police officer or highway patrolman.
- 32-2113. Local authorities.
- 32-2114. Street or highway—private road or driveway—roadway—sidewalk—laned roadway—through highway—controlled access highway.
- 32-2115. Intersection.
- 32-2116. Crosswalk.
- 32-2117. Safety zone.
- 32-2118. Business district—residence district.
- 32-2119. Official traffic-control devices—traffic-control signal—railroad sign or signal.
- 32-2120. Traffic.
- 32-2121. Right of way.
- 32-2122. Stop—stop, stopping, or standing—park.
- 32-2123. Arterial street—implement of husbandry—urban district.
- 32-2124. Provisions of act refer to vehicles upon the highways—exceptions.
- 32-2124.1. Operation of vehicles across public roads and highways not considered operation on roads, when.
- 32-2124.2. Authority to regulate, license, or tax the fuel extends only to vehicles operated on public roads.
- 32-2125. Required obedience to traffic laws.

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- 32-2126. Obedience to police officers and highway patrolmen.
- 32-2127. Public officers and employees to obey act.
- 32-2128. Authorized emergency vehicles.
- 32-2129. Traffic laws apply to persons driving animal-drawn vehicles.
- 32-2130. Provisions of act uniform throughout state.
- 32-2131. Powers of local authorities.
- 32-2132. This act not to interfere with rights of owners of real property with reference thereto.
- 32-2133. State highway commission to adopt sign manual.
- 32-2134. State highway commission to sign all state highways.
- 32-2135. Local traffic-control devices.
- 32-2136. Obedience to and required traffic-control devices.
- 32-2137. Traffic-control signal legend.
- 32-2138. Pedestrian control signals.
- 32-2139. Flashing signals.
- 32-2140. Display of unauthorized signs, signals, or markings.
- 32-2141. Interference with official traffic-control devices or railroad signs or signals.
- 32-2142. Persons under the influence of intoxicating liquor or of drugs.
- 32-2143. Reckless driving.
- 32-2144. Speed restrictions—basic rule.
- 32-2145. Establishment of state speed zones.
- 32-2146. When local authorities may and shall alter limits.
- 32-2147. Minimum speed regulations.
- 32-2148. Special speed limitations on trucks, truck-tractors, motor-driven cycles and vehicles towing house trailers.
- 32-2149. Special speed limitations.
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- 32-2150.1. Use of radar—evidence admissible.
- 32-2150.2. Arrest without a warrant in radar cases.
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- 32-2157. No-passing zones.
- 32-2158. One-way roadways and rotary traffic islands.
- 32-2159. Driving on roadways laned for traffic.
- 32-2160. Following too closely.
- 32-2161. Driving on divided highways.
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- 32-2164. Required position and method of turning at intersections.
- 32-2165. Turning on curve or crest of grade prohibited.
- 32-2166. Starting parked vehicle.
- 32-2167. Turning movements and required signals.
- 32-2168. Signals by hand and arm or signal device.
- 32-2169. Method of giving hand-and-arm signals.
- 32-2170. Vehicle approaching or entering intersection.
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- 32-2174. Vehicles approaching "Yield Right of Way" sign.
- 32-2175. Operation of vehicles on approach of authorized emergency vehicles.
- 32-2176. Pedestrians subject to traffic regulations.
- 32-2177. Pedestrians' right of way in crosswalk.
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- 32-2181. Pedestrians on roadways.
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- 32-2188. Riding on roadways and bicycle paths.
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- 32-2192. All vehicles must stop at certain railroad grade crossings.
- 32-2193. Certain vehicles must stop at all railroad grade crossings.
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- 32-2195. Vehicles must stop at stop signs.
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- 32-2197. Overtaking and passing school bus.
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- 32-2199. Stopping, standing, or parking outside of business or residence districts.
- 32-21-100. Officers or highway patrolmen authorized to remove illegally stopped vehicles.
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- 32-21-102. Additional parking regulations.
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- 32-21-108. Coasting prohibited.
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- 32-21-112. Riding on fenders or running boards prohibited.
- 32-21-112.1. Riding in house trailers.
- 32-21-112.2. Opening and closing vehicles doors.
- 32-21-113. Shooting from or across highway.
- 32-21-114. Scope and effect of regulations.
- 32-21-115. When lighted lamps are required.
- 32-21-116. Visibility distance and mounted height of lamps.
- 32-21-117. Head lamps on motor vehicles.
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- 32-21-119. New motor vehicles to be equipped with reflectors.
- 32-21-120. Stop lamps and turn signals required on new motor vehicles.
- 32-21-121. Application of succeeding sections.
- 32-21-122. Additional equipment required on certain vehicles.
- 32-21-123. Color of clearance lamps, side marker lamps, reflectors and back-up lamps.
- 32-21-124. Mounting of reflectors, clearance lamps, and side marker lamps.
- 32-21-125. Visibility of reflectors, clearance lamps, and marker lamps.
- 32-21-126. Obstructed lights not required.
- 32-21-127. Lamp or flag on projecting load.
- 32-21-128. Lamps on parked vehicles.
- 32-21-129. Lamps on farm tractors, farm equipment, and implements of husbandry.
- 32-21-130. Lamps on other vehicles and equipment.
- 32-21-131. Spot lamps and auxiliary lamps.
- 32-21-132. Audible and visual signals on vehicles.
- 32-21-133. Signal lamps and signal devices.
- 32-21-134. Additional lighting equipment.
- 32-21-135. Multiple-beam road-lighting equipment.
- 32-21-136. Use of multiple-beam road-lighting equipment.
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- 32-21-138. Lighting equipment on motor-driven cycles.
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- 32-21-140. Number of driving lamps required or permitted.
- 32-21-141. Special restrictions on lamps.
- 32-21-141.1. Blinker-type red light on fireman's private vehicle—use—identification card.
- 32-21-141.2. Violation—misdemeanor.
- 32-21-142. Standards for lights on snow-removal equipment.
- 32-21-143. Brakes.
- 32-21-144. Brakes on motor-driven cycles.
- 32-21-145. Horns and warning devices.

- 32-21-146. Mufflers, prevention of noise.
- 32-21-147. Mirrors.
- 32-21-148. Windshields must be unobstructed and equipped with wipers.
- 32-21-149. Restrictions as to tire equipment.
- 32-21-150. Safety glazing material in motor vehicles.
- 32-21-151. Certain vehicles to carry flares or other warning devices.
- 32-21-152. Display of warning devices when vehicle disabled.
- 32-21-153. Vehicles transporting explosives.
- 32-21-154. Vehicles without required equipment or in unsafe condition.
- 32-21-155. Inspections by officers of the department.
- 32-21-156. Owners and drivers to comply with inspection laws.
- 32-21-157. Penalties for misdemeanor.
- 32-21-158. Uniformity of interpretation.
- 32-21-159. Short title.
- 32-21-160. Constitutionality.
- 32-21-161. Commercial tow car requirements.
- 32-21-162. Penalty.
- 32-21-163. Unlawful operation by child under eighteen—exclusive jurisdiction of district court—penalties—impounding of vehicle, when.
- 32-21-164. Summons—issuing to child under eighteen.
- 32-21-165. Court learning of unlawful operation by child under eighteen—authority.

32-2101. Definition of words and phrases. The following words and phrases when used in this act shall, for the purpose of this act, have meanings respectively ascribed to them in sections 32-2101 to 32-2123.

History: En. Sec. 1, Ch. 263, L. 1955.

Compiler's Note

Sections 32-2101 to 32-2123 comprised Article I of Ch. 263, Laws 1955 entitled "Words and Phrases Defined."

Collateral References

Automobiles—1.
39 C.J.S. Highways § 1; 60 C.J.S. Motor Vehicles §§ 1-8.
5A Am. Jur. 217, Automobiles and Highway Traffic, §§ 2, 3.

32-2102. Definitions — vehicle — motor vehicle — motorcycle — motor-driven cycle—authorized emergency vehicle—school bus—bicycle—special mobile equipment. (a) **Vehicle.** Every device, in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks.

(b) **Motor Vehicle.** Every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails.

(c) **Motorcycle.** Every motor vehicle having a seat or saddle for the use of the rider and designed to travel on not more than three (3) wheels in contact with the ground, but excluding a tractor.

(d) **Motor-Driven Cycle.** Every motorcycle, including every motor scooter, with a motor which produces not to exceed five (5) horsepower, and every bicycle with motor attached.

(e) **Authorized Emergency Vehicle.** Vehicles of the fire department, fire patrol, police vehicles, and such ambulances and emergency vehicles of municipal departments or public service corporations or of persons as are designated or authorized by the board.

(f) **School Bus.** Every motor vehicle owned by a public or governmental agency and operated for the transportation of children to or from school or privately owned and operated for compensation for the transportation of children to or from school.

(g) **Bicycle.** Every device propelled by human power upon which any person may ride, having two (2) tandem wheels either of which is more than twenty (20) inches in diameter.

(h) **Special Mobile Equipment.** Every vehicle not designed or used primarily for the transportation of persons or property and incidentally operated or moved over the highways, including farm tractors, road construction or maintenance machinery, ditch-digging apparatus, well-boring apparatus and concrete mixers. The foregoing enumeration shall be deemed partial and shall not operate to exclude other such vehicles which are within the general terms of this section.

History: En. Sec. 2, Ch. 263, L. 1955.

Laws 1955 entitled "Vehicles and Equipment Defined."

Compiler's Note

Sections 32-2102 to 32-2109 comprised
Subdivision I of Article I of Ch. 263,

32-2103. Definitions—truck-tractor—farm tractor—road tractor. (a) **Truck-tractor.** Every motor vehicle designed and used primarily for drawing other vehicles and not so constructed as to carry a load other than a part of the weight of the vehicle and load so drawn.

(b) **Farm Tractor.** Every motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines, and other implements of husbandry.

(c) **Road Tractor.** Every motor vehicle designed and used for drawing other vehicles and not so constructed as to carry any load thereon either independently or any part of the weight of a vehicle or load so drawn.

History: En. Sec. 3, Ch. 263, L. 1955.

32-2104. Definitions—truck—bus—trackless trolley coach. (a) **Truck.** Every motor vehicle designed, used, or maintained primarily for the transportation of property.

(b) **Bus.** Every motor vehicle designed for carrying more than ten (10) passengers and used for the transportation of persons; and every motor vehicle, other than a taxicab, designed and used for the transportation of persons for compensation.

(c) **Trackless Trolley Coach.** Every motor vehicle which is propelled by electric power obtained from overhead trolley wires but not operated upon rails.

History: En. Sec. 4, Ch. 263, L. 1955.

32-2105. Definitions—trailer—semitrailer—pole trailer—house trailer. (a) **Trailer.** Every vehicle with or without motive power, other than a pole trailer, designed for carrying property and for being drawn by a motor vehicle and so constructed that no part of its weight rests upon the towing vehicle.

(b) **Semitrailer.** Every vehicle with or without motive power, other than a pole trailer, designed for carrying property and for being drawn by a motor vehicle and so constructed that some part of its weight and that of its load rests upon or is carried by another vehicle.

(c) Pole Trailer. Every vehicle without power designed to be drawn by another vehicle and attached to the towing vehicle by means of a reach, or pole, or by being boomed or otherwise secured to the towing vehicle, and ordinarily used for transporting long or irregularly shaped loads such as poles, pipes, or structural members capable, generally, of sustaining themselves as beams between the supporting connections.

(d) House Trailer. A trailer or a semitrailer which is designed, constructed and equipped as a dwelling place, living abode or sleeping place (either permanently or temporarily) and is equipped for use as a conveyance on streets and highways, or a trailer or semitrailer whose chassis and exterior shell is designed and constructed for use as a house trailer, as defined above, but which is used permanently or temporarily for the advertising, sales, display or promotion of merchandise or services, or for any commercial purpose except the transportation of property for hire or the transportation of property for distribution by a private carrier.

History: En. Sec. 5, Ch. 263, L. 1955;
amd. Sec. 1, Ch. 204, L. 1957.

32-2106. Definitions—pneumatic tire—solid tire—metal tires. (a) Pneumatic Tire. Every tire in which compressed air is designed to support the load.

(b) Solid Tire. Every tire of rubber or other resilient material which does not depend upon compressed air for the support of the load.

(c) Metal Tires. Every tire the surface of which in contact with the highway is wholly or partly metal or other hard nonresilient material.

History: En. Sec. 6, Ch. 263, L. 1955.

32-2107. Definitions—railroad—railroad train. (a) Railroad. A carrier of persons or property upon cars, other than streetcars, operated upon stationary rails.

(b) Railroad Train. A steam engine, electric or other motor, with or without cars coupled thereto, operated upon rails, except streetcars.

History: En. Sec. 7, Ch. 263, L. 1955.

32-2108. Definitions — explosives — flammable liquid. (a) Explosives. Any chemical compound or mechanical mixture that is commonly used or intended for the purpose of producing an explosion and which contains any oxidizing and combustive units or other ingredients in such proportions, quantities, or packing that an ignition by fire, by friction, by concussion, by percussion, or by detonator of any part of the compound or mixture may cause such sudden generation of highly heated gases that the resultant gaseous pressures are capable of producing destructive effects on contiguous objects or of destroying life or limb.

(b) Flammable Liquid. Any liquid which has a flash point of seventy (70) degrees F., or less, as determined by a tagliabue or equivalent closed cup test device.

History: En. Sec. 8, Ch. 263, L. 1955.

32-2109. Definitions—gross weight. Gross Weight. The weight of a vehicle without load plus the weight of any load thereon.

History: En. Sec. 9, Ch. 263, L. 1955.

32-2110. Definitions—supervisor—board—commission. (a) Supervisor. The supervisor of the Montana highway patrol of this state.

(b) Board. The Montana highway patrol board of this state acting directly or through its duly authorized officers and agents.

(c) Commission. The state highway commission of Montana.

History: En. Sec. 10, Ch. 263, L. 1955.

Laws 1955 entitled "Governmental Agencies, Persons, Owners, etc., Defined."

Compiler's Note

Sections 32-2110 to 32-2113 comprised
Subdivision II of Article I of Ch. 263,

32-2111. Definitions—person—pedestrian—driver—owner. (a) Person. Every natural person, firm, copartnership, association, or corporation.

(b) Pedestrian. Any person afoot.

(c) Driver. Every person who drives or is in actual physical control of a vehicle.

(d) Owner. A person who holds the legal title of a vehicle or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then such conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this act.

History: En. Sec. 11, Ch. 263, L. 1955.

rights given, and duties imposed, by traffic rules and regulations. 30 ALR 2d 866.

Collateral References

Who is "pedestrian" with respect to

32-2112. Police officer or highway patrolman. Every officer authorized to direct or regulate traffic or to make arrests for violations of traffic regulations.

History: En. Sec. 12, Ch. 263, L. 1955.

32-2113. Local authorities. Every county, municipal, and other local board or body having authority to enact laws relating to traffic under the constitution and laws of this state.

History: En. Sec. 13, Ch. 263, L. 1955.

32-2114. Street or highway—private road or driveway—roadway—side-walk—laned roadway—through highway—controlled access highway. (a) Street or Highway. The entire width between the boundary lines of every street, highway and related structure as have been, or shall be, built and maintained with appropriated funds of the United States and which have been, or shall be, built and maintained with funds of the state of Montana, or any political subdivision thereof, or which have been or shall be dedicated to public use or have been acquired by eminent domain.

(b) Private Road or Driveway. Every way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner, but not by other persons.

(c) Roadway. That portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the berm or shoulder. In the event a highway includes two (2) or more separate roadways the term "roadway" as used herein shall refer to any such roadway separately but not to all such roadways collectively.

(d) Sidewalk. That portion of a street between the curb lines or the lateral lines of a roadway, and the adjacent property lines, intended for use of pedestrians.

(e) Laned Roadway. A roadway which is divided into two (2) or more clearly marked lanes for vehicular traffic.

(f) Through Highway. Every highway or portion thereof at the entrances to which vehicular traffic from intersecting highways is required by law to stop before entering or crossing the same and when stop signs are erected as provided in this act.

(g) Controlled Access Highway. Every highway, street, or roadway, in respect to which owners or occupants of abutting lands and other persons have no legal right of access to or from the same except at such points only and in such manner as may be determined by the public authority having jurisdiction over such highway, street, or roadway.

History: En. Sec. 14, Ch. 263, L. 1955; Subdivision III of Article I of Ch. 263, amd. Sec. 2, Ch. 247, L. 1959. Laws 1955 entitled "Highways, Restricted Districts, Zones, etc., Defined."

Compiler's Note

Sections 32-2114 to 32-2123 comprised

DECISIONS UNDER FORMER LAW

Highway

Prior to the 1959 amendment of subd. (a), a road that was not publicly maintained was not a highway within the mean-

ing of this chapter even though it may have been open to public use. *Leach v. Great Northern Ry. Co.*, — M —, 360 P 2d 94.

32-2115. Intersection. (a) The area embraced within the prolongation or connection of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways of two (2) highways which join one another at, or approximately at, right angles, or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict.

(b) Where a highway includes two roadways thirty (30) feet or more apart, then every crossing of each roadway of such divided highway by an intersecting highway shall be regarded as a separate intersection. In the event such intersecting highway also includes two (2) roadways thirty (30) feet or more apart, then every crossing of two (2) roadways of such highways shall be regarded as a separate intersection.

History: En. Sec. 15, Ch. 263, L. 1955.

Nature of Roads Forming Intersection

In order to show that a junction of two roads constitutes an "intersection," it

must be shown that both roads are "highways" within the meaning of section 32-2114. *Leach v. Great Northern Ry. Co.*, — M —, 360 P 2d 94.

32-2116. Crosswalk. (a) That part of a roadway at an intersection included within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs, or in the absence of curbs, from the edges of the traversable roadway.

(b) Any portion of a roadway at an intersection or elsewhere distinctly indicated for pedestrians crossing by lines or other markings on the surface.

History: En. Sec. 16, Ch. 263, L. 1955.

32-2117. Safety zone. The area or space officially set apart within a roadway for the exclusive use of pedestrians and which is protected or is so marked or indicated by adequate signs as to be plainly visible at all times while set apart as a safety zone.

History: En. Sec. 17, Ch. 263, L. 1955.

32-2118. Business district—residence district. (a) Business District. The territory contiguous to and including a highway when within any six hundred (600) feet along such highway there are buildings in use for business or industrial purposes, including but not limited to hotels, banks, or office buildings, railroad stations, and public buildings which occupy at least three hundred (300) feet of frontage on one (1) side or three hundred (300) feet collectively on both sides of the highway.

(b) Residence District. The territory contiguous to and including a highway not comprising a business district when the property on such highway for a distance of three hundred (300) feet or more is in the main improved with residences or residences and buildings in use for business.

History: En. Sec. 18, Ch. 263, L. 1955.

Collateral References

Meaning of "residence district," "busi-

ness district," "school area," and the like, in statutes and ordinances regulating speed of motor vehicles. 50 ALR 2d 343.

32-2119. Official traffic-control devices—traffic-control signal—railroad sign or signal. (a) Official Traffic-control Devices. All signs, signals, markings, and devices not inconsistent with this act placed or erected by authority of a public body or official having jurisdiction, for the purpose of regulating, warning, or guiding traffic.

(b) Traffic-control Signal. Any device, whether manually, electrically, or mechanically operated, by which traffic is alternately directed to stop and to proceed.

(c) Railroad Sign or Signal. Any sign, signal, or device erected by authority of a public body or official or by a railroad and intended to give notice of the presence of railroad tracks or the approach of a railroad train.

History: En. Sec. 19, Ch. 263, L. 1955.

32-2120. Traffic. Pedestrians, ridden or herded animals, vehicles, street-cars, and other conveyances either singly or together while using any highways for purposes of travel.

History: En. Sec. 20, Ch. 263, L. 1955.

32-2121. Right of way. The privilege of the immediate use of the roadway.

History: En. Sec. 21, Ch. 263, L. 1955.

32-2122. Stop—stop, stopping, or standing—park. (a) Stop. When required means complete cessation from movement.

(b) Stop, Stopping, or Standing. When prohibited means any stopping or standing of a vehicle, whether occupied or not, except when necessary to avoid conflict with other traffic or in compliance with the directions of a police officer, highway patrolman, or traffic-control sign or signal.

(c) Park. When prohibited means the standing of a vehicle, whether occupied or not, otherwise than temporarily for the purpose of and while actually engaged in loading or unloading.

History: En. Sec. 21.1, Ch. 263, L. 1955.

32-2123. Arterial street—implement of husbandry—urban district. (a) Arterial Street. Any U. S. or state numbered route, controlled access highway, or other major radial or circumferential street or highway designated by local authorities within their respective jurisdictions as part of a major arterial system or highway.

(b) Implement of Husbandry. Every vehicle which is designed for agricultural purposes and exclusively used by the owner thereof in the conduct of his agricultural operations.

(c) Urban District. The territory contiguous to and including any street which is built up with structures devoted to business, industry, or dwelling houses situated at intervals of less than one hundred (100) feet for a distance of a quarter ($\frac{1}{4}$) of a mile or more.

History: En. Sec. 21.2, Ch. 263, L. 1955.

32-2124. Provisions of act refer to vehicles upon the highways—exceptions. The provisions of this act relating to the operation of vehicles refer exclusively to the operation of vehicles upon highways except:

1. Where a different place is specifically referred to in a given section.
2. The provisions of sections 32-2142 and 32-2143, and chapter 12, title 32, Revised Codes of Montana, 1947, shall apply upon highways and elsewhere throughout the state.

History: En. Sec. 22, Ch. 263, L. 1955.

Compiler's Note

Sections 32-2124 to 32-2132 comprised Article II of Ch. 263, Laws 1955 entitled "Obedience to and Effect of Traffic Laws."

Collateral References

Automobiles—5-11.
40 C.J.S. Highways § 232; 60 C.J.S. Motor Vehicles §§ 14-25.
5A Am. Jur. 223, Automobiles and Highway Traffic, §§ 6-8.

32-2124.1. Operation of vehicles across public roads and highways not considered operation on roads, when. The operation of motor vehicles directly across the public roads and highways of this state, especially as required in the transportation of natural resource products, including agricultural products and livestock, shall not be considered to be the operation of such vehicles on the public roads and highways of this state; provided,

that such crossings are adequately marked with such warning signs or devices, and are subject to relating to stopping before entry, and to restoration of any damage, as may reasonably be prescribed by the state or local agency in control of safety of operation of the public highway involved.

History: En. Sec. 4, Ch. 247, L. 1959.

32-2124.2. Authority to regulate, license, or tax the fuel extends only to vehicles operated on public roads. The authority to regulate motor vehicles, to license the same, or to tax the fuel used therein, under the provisions of any statutes of the state of Montana, shall only be exercised as to vehicles operated on the public roads and highways of this state.

History: En. Sec. 5, Ch. 247, L. 1959.

32-2125. Required obedience to traffic laws. It is unlawful and, unless otherwise declared in this act with respect to particular offenses, it is a misdemeanor for any person to do any act forbidden or fail to perform any act required in this act.

History: En. Sec. 23, Ch. 263, L. 1955.

32-2126. Obedience to police officers and highway patrolmen. No person shall willfully fail or refuse to comply with any lawful order or direction of any police officer or highway patrolman pertaining to the use of the highways by traffic.

History: En. Sec. 24, Ch. 263, L. 1955.

32-2127. Public officers and employees to obey act. (a) The provisions of this act applicable to the drivers of vehicles upon the highways shall apply to the drivers of all vehicles owned or operated by the United States, this state, or any county, city, or town, district, or any other political subdivision of the state, except as provided in this section and subject to such specific exceptions as are set forth in this act with reference to authorized emergency vehicles.

(b) **Persons Working on Highways—Exceptions.** Unless specifically made applicable, the provisions of this chapter except those contained in sections 32-2176 to 32-2183 shall not apply to persons, teams, motor vehicles and other equipment while actually engaged in work upon the surface of a highway but shall apply to such persons and vehicles when traveling to or from such work.

History: En. Sec. 25, Ch. 263, L. 1955.

Collateral References

Public officials or employees as subject to speed regulations. 19 ALR 459.

32-2128. Authorized emergency vehicles. (a) The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions herein stated.

(b) The driver of an authorized emergency vehicle may:

1. Park or stand, irrespective of the provisions of this act;

2. Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;

3. Exceed the speed limits so long as he does not endanger life or property;

4. Disregard regulations governing direction of movement or turning in specified directions.

(c) The exemptions herein granted to an authorized emergency vehicle shall apply only when such vehicle is making use of audible and visual signals meeting the requirements of section 32-21-132, except that an authorized emergency vehicle operated as a police vehicle need not be equipped with or display a red light visible from in front of the vehicle.

(d) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

History: En. Sec. 25.1, Ch. 263, L. 1955;
amd. Sec. 1, Ch. 169, L. 1957.

Collateral References

Ambulances as subject to speed regulations. 9 ALR 368.

32-2129. Traffic laws apply to persons driving animal-drawn vehicles. Every person driving an animal-drawn vehicle upon a roadway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle by this act, except those provisions of this act which by their very nature can have no application.

History: En. Sec. 26, Ch. 263, L. 1955.

32-2130. Provisions of act uniform throughout state. The provisions of this act shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein and no local authority shall enact or enforce any ordinance, rule, or regulations in conflict with the provisions of this act unless expressly authorized herein. Local authorities may, however, adopt additional traffic regulations which are not in conflict with the provisions of this act.

History: En. Sec. 27, Ch. 263, L. 1955;
amd. Sec. 1, Ch. 201, L. 1957.

32-2131. Powers of local authorities. (a) The provisions of this act shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from:

1. Regulating the standing or parking of vehicles;
2. Regulating the traffic by means of police officers or traffic-control devices;
3. Regulating or prohibiting processions or assemblages on the highways;
4. Designating particular highways as one-way highways and requiring that all vehicles thereon be moved in one (1) specific direction;
5. Regulating the speed of vehicles in public parks;
6. Designating any highway as a through highway and requiring that all the vehicles stop before entering or crossing the same, designating any

intersection as a stop intersection, and requiring all vehicles to stop at one or more entrances to such intersections;

7. Restricting the use of highways as authorized in section 32-1128;

8. Regulating the operation of bicycles and requiring the registration and licensing of same, including the requirement of a registration fee;

9. Regulating or prohibiting the turning of vehicles or specified types of vehicles at intersections;

10. Altering the speed limits as authorized herein;

11. Regulating the driving of vehicles by any person who is an habitual user of, or under the influence of, any narcotic drug or who is under the influence of any other drug to a degree which renders him incapable of safely driving a vehicle within the incorporated limits of any city or town.

12. Regulating or prohibiting any person who is under the influence of intoxicating liquor from driving or being in actual physical control of any vehicle within the incorporated limits of any city or town.

13. Regulating or prohibiting the driving of vehicles by any person in a willful or wanton disregard for the safety of persons or property within the incorporated limits of any city or town.

14. Enacting as ordinances any and all provisions of this act and any and all other acts regulating traffic, pedestrians, vehicles and operators thereof, not in conflict with state law or federal regulations and to enforce the same within their jurisdiction.

History: En. Sec. 28, Ch. 263, L. 1955; amd. Sec. 2, Ch. 201, L. 1957; amd. Sec. 1, Ch. 240, L. 1959.

Driving under Influence

A city ordinance which penalized drunk-

en driving within the city in the same terms as subds. (a) and (c) (now (a) and (d)) of section 32-2142 was valid and enforceable even though the legislature had acted on the subject. *City of Bozeman v. Ramsey*, — M —, 362 P 2d 206.

DECISIONS UNDER FORMER LAW

Conflicting Statute and Ordinance

As between the former statute providing that motor vehicles shall not pass a standing streetcar at a less distance than eight feet nor at a speed greater than six miles an hour, and a city ordinance providing that on business streets automobiles must not be driven faster than twelve miles an hour and must stop when passing a stand-

ing streetcar on the side on which passengers are discharged and received, the ordinance was controlling, and under it defendant was not required to stop when driving on the opposite side of a standing streetcar nor to clear it by a space of eight feet. *Carey v. Guest*, 78 M 415, 431 et seq., 258 P 236.

32-2132. This act not to interfere with rights of owners of real property with reference thereto. Nothing in this act shall be construed to prevent the owner of real property used by the public for purposes of vehicular travel by permission of the owner, from prohibiting such use, or from requiring other or different or additional conditions than those specified in this act, or otherwise regulating such use as may seem best to such owner.

History: En. Sec. 29, Ch. 263, L. 1955.

32-2133. State highway commission to adopt sign manual. The state highway commission shall adopt a manual and specifications for a uniform

system of traffic-control devices consistent with the provisions of this act for use upon highways within the state. Such uniform system shall correlate with and so far as possible conform to the system then current as approved by the American association of state highway officials, provided however, that the commission shall adopt for use on controlled access highways, the interstate sign manual as adopted by the American association of state highway officials, February 10, 1958, and approved by the United States department of commerce, bureau of public roads, February 21, 1958, and all subsequent amendments relating thereto.

History: En. Sec. 30, Ch. 263, L. 1955; Article III of Ch. 263, Laws 1955 entitled amd. Sec. 1, Ch. 241, L. 1959. "Traffic Signs, Signals, and Markings."

Compiler's Note

Sections 32-2133 to 32-2141 comprised

Collateral References

Highways 165.
40 C.J.S. Highways § 232.

32-2134. State highway commission to sign all state highways. (a) The state highway commission shall place and maintain such traffic-control devices, conforming to its manual and specifications, upon all state highways as it shall deem necessary to indicate and to carry out the provisions of this act or to regulate, warn, or guide traffic.

(b) No local authority shall place or maintain any traffic-control device upon any highway under the jurisdiction of the state highway commission except by the latter's permission.

(c) The commission only shall erect, place and maintain such traffic-control devices conforming to its manual and specifications upon any controlled access highway or controlled access facility. The erection of any sign, marker, or emblem upon a controlled access facility or controlled access highway by any other public authority, or agent, or by any private individual, firm or corporation is forbidden and is hereby declared to be a misdemeanor and punished as provided in subsec. (e).

(d) The erection, placement, or maintenance of any sign, marker, emblem or traffic-control device upon any state highway except a controlled access highway or controlled access facility, shall be subject to the rules, regulations and specifications as the commission shall adopt and publish in the interest of public safety and convenience.

(e) The erection of any sign, emblem, marker or traffic-control device in violation of this section shall be a misdemeanor and upon conviction, punishable by a fine of not less than twenty-five dollars (\$25.00) nor more than three hundred dollars (\$300.00).

(f) Every such unauthorized sign, emblem, marker or traffic-control device or portion thereof encroaching into, over, or upon a right of way of any state highway, or controlled access highway is hereby declared to be a public nuisance, and the highway commission is hereby empowered to remove the same or cause it to be removed without notice and without liability for such removal.

History: En. Sec. 31, Ch. 263, L. 1955; maintain warning signs or devices for amd. Sec. 1, Ch. 224, L. 1959. curves in highway. 55 ALR 2d 1000.

Collateral References

Duty of public authorities to erect and

32-2135. Local traffic-control devices. (a) Local authorities in their respective jurisdictions shall place and maintain such traffic-control devices upon highways under their jurisdiction as they may deem necessary to indicate and to carry out the provisions of this act or local traffic ordinances or to regulate, warn, or guide traffic. All such traffic-control devices hereafter erected shall conform to the state manual and specifications.

History: En. Sec. 32, Ch. 263, L. 1955.

Collateral References

Liability of municipality for failure to

erect warnings to traffic against entering or using street which is partially barred or obstructed by construction or improvement work. 52 ALR 2d 689.

32-2136. Obedience to and required traffic-control devices. (a) The driver of any vehicle shall obey the instructions of any official traffic-control device applicable thereto placed in accordance with the provisions of this act, unless otherwise directed by a highway patrolman or police officer, subject to the exceptions granted the driver of an authorized emergency vehicle in this act.

(b) No provision of this act for which signs are required shall be enforced against an alleged violator if at the time and place of the alleged violation an official sign is not in proper position and sufficiently legible to be seen by an ordinarily observant person. Whenever a particular section does not state the signs are required, such section shall be effective even though no signs are erected or in place.

History: En. Sec. 33, Ch. 263, L. 1955.

32-2137. Traffic-control signal legend. Whenever traffic is controlled by traffic-control signals exhibiting the words "Go," "Caution," or "Stop," or exhibiting different colored lights successively one at a time, or with arrows, the following colors only shall be used and said terms and lights shall indicate and apply to drivers of vehicles and pedestrians as follows:

(a) Green Alone or "Go":

1. Vehicular traffic facing the signal may proceed straight through or turn left or right unless a sign at such place prohibits either such turn. But vehicular traffic, including vehicles turning right or left, shall yield the right of way to other vehicles and to pedestrians lawfully within the intersection of an adjacent crosswalk at the time such signal is exhibited.

2. Pedestrians facing the signal may proceed across the roadway within any marked or unmarked crosswalk.

(b) Yellow Alone or "Caution" When Shown Following the Green or "Go" Signal:

1. Vehicular traffic facing the signal is thereby warned that the red or "Stop" signal will be exhibited immediately thereafter and such vehicular traffic shall not enter or be crossing the intersection when the red or "Stop" signal is exhibited.

2. Pedestrians facing such signals are thereby advised that there is insufficient time to cross the roadway, and any pedestrian then starting to cross shall yield the right of way to all vehicles.

(c) Red Alone or "Stop":

1. Vehicular traffic facing the signal shall stop before entering the crosswalk on the near side of the intersection or, if none, then before en-

tering the intersection and shall remain standing until green or "Go" is shown alone.

2. No pedestrian facing such signal shall enter the roadway unless he can do so safely and without interfering with any vehicular traffic.

(d) Red with Green Arrow:

1. Vehicular traffic facing such signal may cautiously enter the intersection only to make the movement indicated by such arrow but shall yield the right of way to pedestrians lawfully within the crosswalk and to other traffic lawfully using the intersection.

2. No pedestrian facing such signal shall enter the roadway unless he can do so safely and without interfering with any vehicular traffic.

(e) Traffic Control Signal at Place Other Than Intersection:

1. In the event an official traffic-control signal is erected and maintained at a place other than an intersection, the provisions of this section shall be applicable except as to those provisions which by their very nature can have no application.

2. Any stop required shall be made at a sign or marking on the pavement indicating where the stop shall be made, but in the absence of any such sign or marking the stop shall be made at the signal.

History: En. Sec. 34, Ch. 263, L. 1955.

32-2138. Pedestrian control signals. Whenever special pedestrian control signals exhibiting the words "Walk" or "Wait" or "Don't Walk" are in place such signals shall indicate as follows:

(a) Walk. Pedestrians facing such signal may proceed across the roadway in the direction of the signal and shall be given the right of way by the drivers of all vehicles.

(b) Wait or Don't Walk. No pedestrian shall start to cross the roadway in the direction of such signal, but any pedestrian who has partially completed his crossing on the walk signal shall proceed to a sidewalk or safety island while the wait signal is showing.

History: En. Sec. 35, Ch. 263, L. 1955.

32-2139. Flashing signals. (a) Whenever an illuminated flashing red or yellow signal is used in a traffic sign or signal it shall require obedience by vehicular traffic as follows:

1. Flashing Red (stop signal). (a) When a red lens is illuminated with rapid intermittent flashes, drivers of vehicles shall stop before entering the nearest crosswalk at an intersection or at a limit line when marked, or, if none, then before entering the intersection, and the right to proceed shall be subject to the rules applicable after making a stop at a stop sign.

(b) This section shall not apply at railroad grade crossings. Conduct of drivers of vehicles approaching railroad grade crossings shall be governed by the rules as set forth in section 32-2191.

2. Flashing Yellow (caution signal). When a yellow lens is illuminated with rapid intermittent flashes, drivers of vehicles may proceed through the intersection or past such signal only with caution.

History: En. Sec. 36, Ch. 263, L. 1955;
amd. Sec. 2, Ch. 169, L. 1957.

32-2140. Display of unauthorized signs, signals, or markings. (a) No person shall place, maintain, or display upon or in view of any highway any unauthorized sign, signal, marking or device which purports to be or is an imitation of or resembles an official traffic-control device or railroad sign, or signal, or which attempts to direct the movement of traffic, or which hides from view or interferes with the effectiveness of any official traffic-control device or any railroad sign or signal.

(b) No person shall place or maintain nor shall any public authority permit upon any highway any traffic sign or signal bearing thereon any commercial advertising.

(c) This section shall not be deemed to prohibit the erection upon private property adjacent to highways of signs giving useful directional information and of a type that cannot be mistaken for official signs.

(d) The prohibition of this section shall not apply to portable "Caution" signs placed in the vicinity of schools at those times during which school children are going to and coming from school.

(e) Every such prohibited sign, signal, or marking is hereby declared to be a public nuisance and the authority having jurisdiction over the highway is hereby empowered to remove the same or cause it to be removed without notice.

History: En. Sec. 37, Ch. 263, L. 1955.

32-2141. Interference with official traffic-control devices or railroad signs or signals. No person shall, without lawful authority, attempt to or in fact alter, deface, injure, knock down, or remove any official traffic-control device or any railroad sign or signal or any inscription, shield, or insignia thereon, or any part thereof.

History: En. Sec. 38, Ch. 263, L. 1955.

32-2142. Persons under the influence of intoxicating liquor or of drugs.

(a) It is unlawful and punishable as provided in paragraph (d) of this section for any person who is under the influence of intoxicating liquor to drive or be in actual physical control of any motor vehicle upon the highways of this state.

(b) In any criminal prosecution for a violation of paragraph (a) of this section relating to driving a vehicle while under the influence of intoxicating liquor, the amount of alcohol in the defendant's blood at the time alleged as shown by chemical analysis of the defendant's blood, urine, breath or other bodily substance, shall give rise to the following presumptions:

1. If there was at that time 0.05 per cent or less by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was not under the influence of intoxicating liquor:

2. If there was at that time in excess of 0.05 per cent but less than 0.15 per cent by weight of alcohol in the defendant's blood, such fact shall not give rise to any presumption that the defendant was or was not under the influence of intoxicating liquor, but such fact may be considered with other competent evidence in determining the guilt or innocence of the defendant:

3. If there was at that time 0.15 per cent or more by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of intoxicating liquor:

4. Per cent by weight of alcohol in the blood shall be based upon milligrams of alcohol per one hundred (100) milligrams of blood:

5. The foregoing provisions of paragraph (b) shall not be construed as limiting the introduction of any other competent evidence bearing upon the question whether or not the defendant was under the influence of intoxicating liquor.

(c) It is unlawful and punishable as provided in paragraph (d) of this section for any person who is an habitual user of or under the influence of any narcotic drug or who is under the influence of any other drug to a degree which renders him incapable of safely driving a motor vehicle to drive a motor vehicle within this state. The fact that any person charged with a violation of this paragraph is or has been entitled to use such a drug under the laws of this state shall not constitute a defense against any charge of violating this paragraph.

(d) Every person who is convicted of a violation of this section shall be punished by imprisonment in the county or city jail for not more than six (6) months or by a fine of not less than one hundred dollars (\$100.00) or more than five hundred dollars (\$500.00) or by both such fine and imprisonment. On a second conviction he shall be punished by imprisonment in the county or city jail for not less than ten (10) days nor more than six (6) months, to which may be added, at the discretion of the court a fine of not less than three hundred dollars (\$300.00) nor more than five hundred dollars (\$500.00). On the third or subsequent conviction he shall be punished by imprisonment for a term of not less than thirty (30) days nor more than one (1) year, to which may be added at the discretion of the court a fine of not less than five hundred dollars (\$500.00) nor more than one thousand dollars (\$1,000.00).

(e) Each and every municipality in this state is hereby given authority to enact the foregoing paragraphs (a), (b), (c) and (d) of this section, with the word "state" in the first sentence of paragraphs (a) and (c) changed in each instance to read "municipality," as an ordinance, and is hereby given jurisdiction of the enforcement of said ordinance, and of the imposition of the fines and penalties therein provided.

(f) The board shall forthwith revoke the license or permit to drive and operating privilege and any nonresident operating privilege of any person upon receiving a record of such person's conviction or forfeiture of bail not vacated, under this section.

History: En. Sec. 39, Ch. 263, L. 1955; amd. Sec. 1, Ch. 194, L. 1957; amd. Sec. 3, Ch. 201, L. 1957; amd. Sec. 1, Ch. 109, L. 1961.

Compiler's Note

Sections 32-2142 and 32-2143 comprised Article IV of Ch. 263, Laws 1955 entitled "Driving While Intoxicated, and Reckless Driving."

Actual Physical Control

By defining the words "actual," "physical," and "control" as they are used in their ordinary meanings, it was held that if a person has existing or present bodily restraint, directing influence, domination or regulation of an automobile while under the influence of intoxicant he violates the statute. *State v. Ruona*, 133 M 243, 321 P 2d 615, 618.

Movement of the vehicle is unnecessary to charge an offense under this provision. *State v. Ruona*, 133 M 243, 321 P 2d 615, 618.

Blood Test

Under information charging driver of death car with manslaughter, blood test taken from defendant soon after his arrival at hospital pursuant to his written consent, which was transmitted to state board of health, analyzed and showed an alcohol concentration of 0.13 per cent, was admissible in evidence, as was the testimony of chemist of state board of health that the percentage of alcohol concentration was high enough to indicate that defendant was under the influence of intoxicating liquor at the time his car hit garage. *State v. Haley*, 132 M 366, 318 P 2d 1084, 1087.

Constitutionality

The term "actual physical control" as used in this section is not so vague, ambiguous, and uncertain as to render the statute void. *State v. Ruona*, 133 M 243, 321 P 2d 615.

Effect of Amendments

The defendant was not prejudiced by being charged under the original version of this section, even though the 1957 amendments may have been applicable to his case, since the definition of the crime was not changed by the amendments. *State v. Cline*, 135 M 372, 339 P 2d 657.

The 1957 amendments did not evince a legislative intent to repeal the 1955 act; rather they were a continuation of the 1955 act so that a violator could still be

prosecuted thereunder. *State v. Cline*, 135 M 372, 339 P 2d 657.

Municipal Ordinance

A city ordinance which penalized drunken driving within the city in the same terms as subds. (a) and (c) (now (a) and (d)) of this section was valid and enforceable even though the legislature had acted on the subject. *City of Bozeman v. Ramsey*, — M —, 362 P 2d 206.

References

State ex rel. Aho v. Justice Court of Laurel Township, 131 M 585, 313 P 2d 542.

Collateral References

Automobiles—332, 359.

61 C.J.S. Motor Vehicles §§ 625-637.

5A Am. Jur. 976, Automobiles and Highway Traffic, §§ 1156-1169.

Driving automobile while intoxicated as a substantive criminal offense. 42 ALR 1498.

Constitutionality and effect of statute relating to civil liability of person driving automobile while under influence of liquor. 56 ALR 327.

Driving while intoxicated as reckless driving, where driving while intoxicated is made a separate offense. 86 ALR 1274.

Criminal liability based on permitting unlicensed person to operate automobile under statute forbidding driving while intoxicated. 137 ALR 477.

What constitutes driving, being in control of, or operating a motor vehicle within statute making such act, while intoxicated, an offense. 47 ALR 2d 570.

What is "motor vehicle" within statute making it offense to drive while intoxicated. 66 ALR 2d 1146.

DECISIONS UNDER FORMER LAW

Allegations of Complaint

Where a complaint charged defendant with driving an automobile upon the public highways and thoroughfares of a certain county while intoxicated, but thereafter specifically alleged how, when and where defendant drove the vehicle while "under the influence of intoxicating liquor," the latter allegation was controlling and sufficient to charge the offense under former section 32-1107; where general allegations are followed by specific averments, the issues are narrowed to the latter. *State v. Schnell*, 107 M 579, 585, 88 P 2d 19.

Intoxication and Influence Distinguished

Former section 32-1107, making it an offense to drive a motor vehicle over any highway, street or public thoroughfare in the state while in an intoxicated condition or under the influence of intoxicating

liquor, or drug or narcotic, was not impliedly repealed by section 1741.7, R. C. M. 1935 (since repealed), which applied to driving a motor vehicle outside of incorporated cities and towns, while intoxicated; the courts recognize a distinction between one who is intoxicated and one who is under the influence of intoxicating liquor, and there is no irreconcilable conflict between the two statutes. *State v. Schnell*, 107 M 579, 583, 88 P 2d 19.

Manslaughter Caused by Violation

To warrant conviction of the crime of involuntary manslaughter by reason of the commission of an unlawful act (driving under influence) it must appear that the doing of the unlawful act contributed to or was the proximate cause of the death. *State v. Darchuck*, 117 M 15, 17, 156 P 2d 173.

Opinion Evidence

Opinion evidence of witnesses for the state, who had observed defendant, to the effect that he was under the influence of liquor while driving an automobile, was properly admitted, together with evidence that an accident occurred at the time he was so driving, showing the circumstances under which the offense was committed. *State v. Schnell*, 107 M 579, 587, 88 P 2d 19.

Urine Test

Even though a urine alcohol test was not specifically provided for by this section prior to 1961, the results thereof could be admitted in evidence and, together with the testimony of an expert witness interpreting the results, could go to the jury. *State v. Cline*, 135 M 372, 339 P 2d 657.

32-2143. Reckless driving. (a) Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.

(b) Every person convicted of reckless driving shall be punished upon a first conviction by imprisonment for a period of not more than ninety (90) days, or by fine of not less than twenty-five dollars (\$25.00) nor more than three hundred dollars (\$300.00), or by both such fine and imprisonment, and on a second or subsequent conviction shall be punished by imprisonment for not less than ten (10) days nor more than six (6) months, or by a fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00), or by both such fine and imprisonment.

(c) Each and every municipality in this state is hereby given authority to enact the foregoing paragraphs (a) and (b) of this section as an ordinance, and is hereby given jurisdiction of the enforcement of said ordinance and of the imposition of the fines and penalties therein provided.

History: En. Sec. 40, Ch. 263, L. 1955; amd. Sec. 4, Ch. 201, L. 1957.

Statute prohibiting reckless driving, definiteness and certainty. 12 ALR 2d 580.

Collateral References

Driving at illegal speed as reckless driving within statute making reckless driving a criminal offense. 86 ALR 1281.

What amounts to reckless driving of motor vehicle within statute making such a criminal offense. 52 ALR 2d 1337.

32-2144. Speed restrictions—basic rule. (a) Every person operating or driving a vehicle of any character on a public highway of this state shall drive the same in a careful and prudent manner, and at a rate of speed no greater than is reasonable and proper under the conditions existing at the point of operation, taking into account amount and character of traffic, condition of brakes, weight of vehicle, grade and width of highway, condition of surface, and freedom of obstruction to view ahead, and so as not to unduly or unreasonably endanger the life, limb, property, or other rights of any person entitled to the use of the street or highway.

(b) Where no special hazard exists that requires lower speed for compliance with paragraph (a) of this section the speed of any vehicle not in excess of the limits specified in this section or established as hereinafter authorized, shall be lawful, but any speed in excess of the limits specified in this section or established as hereinafter authorized shall be unlawful:

1. Twenty-five (25) miles per hour in any urban district;
2. Thirty-five (35) miles per hour on any highways under construction or repairs;

3. Fifty-five (55) miles per hour in such other locations during the nighttime;

Daytime means from a half ($\frac{1}{2}$) hour before sunrise to a half ($\frac{1}{2}$) hour after sunset. Nighttime means at any other hour.

The speed limits set forth in this section may be altered as authorized in sections 32-2145 and 32-2146.

(c) The driver of every vehicle shall, consistent with the requirements of paragraph (a), drive at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, and when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway condition.

History: En. Sec. 41, Ch. 263, L. 1955.

Compiler's Note

Sections 32-2144 to 32-2150 comprised Article V of Ch. 263, Laws 1955 entitled "Speed Restrictions."

Passenger Carriers

Although carrier of persons for hire must exercise the highest degree of care, it is not an insurer of passenger's safety. *Wilson v. Northland Greyhound Lines, Inc.*, 166 F Supp 667, 669.

Snow Conditions

When traveling under snow conditions a driver should be alert for approaching vehicles and should take steps to keep his vehicle under control while passing through a snow cloud. Similarly, a driver following such a cloud should remain a safe distance behind, taking into consideration the probability that other vehicles will be coming through the cloud under conditions of reduced visibility. *Merithew v. Hill*, 167 F Supp 320, 327.

Speed as Factor in Determining Negligence

The actual speed in miles per hour a person is driving does not determine whether the motorist is negligent, but the question is one of fact as to whether he was driving as a reasonable and prudent person would under the conditions existing. *Nissen v. Johnson*, 135 M 329, 339 P 2d 651.

DECISIONS UNDER FORMER LAW

Negligence in Civil Actions

Where the rate of speed was alleged as an element of negligence, the pertinent question was whether the rate of speed was so excessive as to affect defendant's control over the car under the conditions which actually existed at the time and place or as they reasonably appeared to him to exist, this being the import of

Collateral References

Automobiles \S 331.

61 C.J.S. Motor Vehicles $\S\S$ 641-650.

5A Am. Jur. 982, Automobiles and Highway Traffic, $\S\S$ 1176, 1177.

Criminal or penal responsibility of public officer or employee for violating speed regulations. 9 ALR 367.

Violation of speed law as affecting violator's right to recover for negligence. 12 ALR 463.

Indefiniteness of automobile speed regulations as affecting validity. 26 ALR 897.

Violation of speed regulations as affecting right to recover for injuries due to collision with streetcar. 28 ALR 228.

Excuse for exceeding speed limit for automobiles. 29 ALR 883.

Indictment or information which charges offense as to speed in language of statute. 115 ALR 357.

Duty of motor vehicle driver approaching place where children are playing or gathered. 30 ALR 2d 5.

Application of "assured clear distance ahead" or "radius of lights" doctrine to accident involving pedestrian crossing street or highway. 31 ALR 2d 1424.

Liability for motor vehicle accident where vision of driver is obscured by smoke, dust, or other atmospheric conditions. 42 ALR 2d 13.

Meaning of "residence district," "business district," "school area," and the like, in statutes and ordinances regulating speed of motor vehicles. 50 ALR 2d 343.

former section 32-1101 relating to the matter of speed regulations on public highways. The mere happening of an accident is not proof of negligence. *Baatz v. Noble*, 105 M 59, 67, 69 P 2d 579.

Reduction of Speed for Hazards

Former section 32-1102, imposing the duty upon drivers of motor vehicles of

slowing down at curves and having their cars under complete control was not invalid as imposing an unreasonable obligation upon drivers and, therefore, unenforceable. *McNair v. Berger*, 92 M 441, 15 P 2d 834.

As against the contention that there was error in giving instruction that the law is that the driver of an automobile must slow down at curves and have his car under complete control, in that there was no evidence that defendant knew or should have known there was a curve at the point of collision, held, that a person is presumed to see, and therefore know, that which he could see by keeping a lookout. *McNair v. Berger*, 92 M 441, 460, 15 P 2d 834.

Evidence that there were danger signs which the defendant did not see but could have seen; that defendant saw many smaller holes and tried to avoid them but

did not slow down when approaching them but continued at a rate of speed not substantially less than his usual speed on good roads, held sufficient to take the question of his gross negligence to the jury. *Baatz v. Noble*, 105 M 59, 67, 69 P 2d 579.

Statutory Limit of Speed

The only restriction or limit placed on the rate of speed at which automobiles shall travel on state highways was that prescribed by former section 32-1101, the import of which is that the speed, whatever it may have been should not have been so excessive as to have affected the driver's control over his car under the conditions which existed at the particular time and place or as they reasonably appeared to him to have existed. *Cowden et al. v. Crippen*, 101 M 187, 203, 53 P 2d 98.

32-2145. Establishment of state speed zones. Whenever the board shall determine upon the basis of an engineering and traffic investigation that any speed is greater or less than is reasonable or safe under the conditions found to exist at any intersection or other place or upon any part of a state highway, said board may determine and declare a reasonable and safe speed limit thereat which when appropriate signs giving notice thereof are erected shall be effective at all times or during hours of daylight or darkness or at such other times as may be determined at such intersections or other place or part of the state highway. This act is not in any way to be construed as authority to set a state-wide speed limit.

History: En. Sec. 42, Ch. 263, L. 1955; amd. Sec. 1, Ch. 204, L. 1959; amd. Sec. 1, Ch. 178, L. 1961.

32-2146. When local authorities may and shall alter limits. (a) Whenever local authorities in their respective jurisdictions determine on the basis of an engineering and traffic investigation that the speed permitted under this act is greater or less than is reasonable and safe under the conditions found to exist upon a highway or part of a highway, the local authority may determine and declare a reasonable and safe limit thereon which:

1. Decreases the limit at intersection; or
2. Increases the limit within an urban district but not to more than fifty-five (55) miles per hour during nighttime; or
3. Decreases the limit outside an urban district, but not to less than thirty-five (35) miles per hour.

(b) Local authorities in their respective jurisdictions shall determine by an engineering and traffic investigation the proper speed for all arterial streets and shall declare a reasonable and safe limit thereon which may be greater or less than the speed permitted under this act for an urban district.

(c) Any altered limit established as hereinabove authorized shall be effective at all times or during hours of darkness or at other times as may

be determined when appropriate signs giving notice thereof are erected upon such street or highway.

(d) Any alteration of speed limits on state highways or extensions thereof in a municipality by local authorities shall not be effective until such alteration has been approved by the commission.

History: En. Sec. 43, Ch. 263, L. 1955.

Collateral References

Conflict between statutes and local regulations as to speed. 21 ALR 1187.

DECISIONS UNDER FORMER LAW

Conflict between Statutes and Ordinances

Where a city or town had, pursuant to former section 32-1101, which delegated the power to cities and towns by ordinance to regulate the speed of automobiles upon the streets within corporate limits, enacted an ordinance on the subject, it had the force of statute, and in case of conflict with the state statute, the ordinance controlled so long as the legislative delegation of authority remained unrepealed;

otherwise the statute would control. *Carey v. Guest*, 78 M 415, 432, 258 P 236.

Instructions to Jury

In an action for damages arising out of an automobile accident which is grounded on a violation of a city ordinance relating to the speed at which vehicles may be driven on its streets, the court should not instruct the jury on the law of the state on the same subject. *Marinkovich v. Tierney et al.*, 93 M 72, 87, 89, 90, 17 P 2d 93.

32-2147. Minimum speed regulations. (a) No person shall drive a motor vehicle at such a slow speed as to impede or block the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law.

Police officers or highway patrolmen are hereby authorized to enforce this provision by directions to drivers, and in the event of apparent willful disobedience to this provision and refusal to comply with direction of an officer in accordance herewith the continued slow operation by a driver shall be a misdemeanor, except that inability to comply with such order will not be construed as willful disobedience.

(b) Whenever the board or local authorities within their respective jurisdictions determine on the basis of an engineering and traffic investigation that slow speeds on any part of a highway consistently impede the normal and reasonable movement of traffic, the board or such local authority may determine and declare a minimum speed limit below which no person shall drive a vehicle except when necessary for safe operation or in compliance with law.

History: En. Sec. 44, Ch. 263, L. 1955.

Collateral References

Construction and operation, in civil motor vehicle accident case, of "slow

speed" traffic statute prohibiting driving at such a slow speed as to create danger, to impede normal traffic movement, or the like. 66 ALR 2d 1194.

32-2148. Special speed limitations on trucks, truck-tractors, motor-driven cycles and vehicles towing house trailers. (a) No person shall operate any truck or truck-tractor the gross weight of which exceeds eight thousand (8,000) pounds at a speed greater than fifty (50) miles per hour.

(b) No person shall operate any motor-driven cycle at any time mentioned in section 32-21-115, at a speed greater than thirty-five (35) miles

per hour unless such motor-driven cycle is equipped with a head lamp or lamps which are adequate to reveal a person or vehicle at a distance of three hundred (300) feet ahead.

(c) No person shall operate a vehicle which is towing a house trailer at a speed greater than a maximum of fifty (50) miles per hour.

History: En. Sec. 45, Ch. 263, L. 1955;
amd. Sec. 1, Ch. 241, L. 1957; amd. Sec. 1,
Ch. 119, L. 1961.

32-2149. Special speed limitations. (a) No person shall drive any vehicle equipped with solid rubber or cushion tires at a speed greater than a maximum of ten (10) miles per hour.

(b) No person shall drive a vehicle over any bridge or other elevated structure constituting a part of a highway at a speed which is greater than the maximum speed which can be maintained with safety to such bridge or structure, when such structure is signposted as provided in this section.

(c) The board upon request from any local authority may, or upon its own initiative shall, conduct an investigation of any bridge or other elevated structure constituting a part of a highway, and if it shall thereupon find that such structure cannot with safety to itself withstand vehicles traveling at the speed otherwise permissible under this act, the board shall determine and declare the maximum speed of vehicles which such structure can withstand, and shall cause or permit suitable signs stating such maximum speed to be erected and maintained at a distance of not less than one hundred (100) feet before each end of such structure.

(d) Upon the trial of any person charged with a violation of this section, proof of said determination of the maximum speed by said board and the existence of said signs shall constitute conclusive evidence of the maximum speed which can be maintained with safety to such bridge or structure.

History: En. Sec. 46, Ch. 263, L. 1955.

32-2150. Charging violations. In every charge of violation of any speed regulation in this act the complaint, also the summons, or notice to appear, shall specify the speed at which the defendant is alleged to have driven, also the speed applicable within the district or at the location.

History: En. Sec. 47, Ch. 263, L. 1955.

32-2150.1. Use of radar—evidence admissible. The speed of any motor vehicle may be measured by the use of radiomicro waves or other electrical device. The results of such measurements shall be accepted as evidence of the speed of such motor vehicle in any court or legal proceedings where the speed of the motor vehicle is at issue.

History: En. Sec. 1, Ch. 120, L. 1959.

5A Am. Jur. 1013, Automobiles and
Highway Traffic, § 1254.

Collateral References

Automobiles 354.

61 C.J.S. Motor Vehicles § 647.

Expert or opinion evidence of speed not
based upon view of vehicle. 156 ALR 382.

32-2150.2. Arrest without a warrant in radar cases. The driver of any such motor vehicle may be arrested without a warrant under this act provided the arresting officer is in uniform or displays his badge of authority and has either:

(a) Observed the recording of the speed of the vehicle by radiomicro waves or other electrical device; or

(b) Received, from the officer who has observed the speed of the vehicle recorded by the radiomicro waves or other electrical device, a radio message giving the license number or other sufficient identification of the vehicle and the recorded speed, dispatched immediately after the speed of the vehicle was recorded; and

(c) That the arrest without a warrant of any such driver must be made immediately after such observation or radio message and as the result of uninterrupted pursuit.

History: En. Sec. 2, Ch. 120, L. 1959.

32-2150.3. Erection of radar signs. (a) No operator of a motor vehicle may be arrested under this act unless signs have been placed at or near the state line on the primary highway system, outside towns or cities having over two thousand five hundred (2,500) population, and outside county seats on the primary highways to indicate the legal rate of speed and that the speed of vehicles may be measured by radiomicro waves or other electrical device.

(b) Any municipality which uses radiomicro waves or other electrical device for law enforcement purposes shall erect and maintain appropriate signs giving notice of such use at a conspicuous place at or near the corporate limits of the municipality, upon each state highway and arterial street or highway entering the municipality, and at such other places as may be deemed necessary by the municipal authorities for the information of the traveling public.

History: En. Sec. 3, Ch. 120, L. 1959.

32-2151. Drive on right side of roadway—exceptions. (a) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:

1. When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;

2. When the right half of a roadway is closed to traffic while under construction or repair;

3. Upon a roadway divided into three (3) marked lanes for traffic under the rules applicable thereon; or

4. Upon a roadway designated and signposted for one-way traffic.

(b) Upon all roadways any vehicle proceeding at less than the normal speed of traffic at the time and place and under the conditions then existing shall be driven in the right-hand lane then available for traffic, or as close as practicable to the right-hand curb or edge of the roadway except when overtaking and passing another vehicle proceeding in the same di-

rection or when preparing for a left turn at an intersection or into a private road or driveway.

History: En. Sec. 48, Ch. 263, L. 1955.

Compiler's Note

Sections 32-2151 to 32-2163 comprised Article VI of Ch. 263, Laws 1955 entitled "Driving on Right Side of Roadway—Overtaking and Passing, etc."

Collateral References

Automobiles 153.
40 C.J.S. Highways §§ 236-238; 60 C.J.S. Motor Vehicles §§ 274-283.
5A Am. Jur. 389, Automobiles and Highway Traffic, §§ 261-264.

Negligence of motorist as to injury or damage occasioned in avoiding collision with vehicle approaching in wrong lane. 47 ALR 2d 119.

Rights, duties and liability with respect to narrow bridge or passage as between motor vehicles approaching from opposite directions. 47 ALR 2d 142.

Driving on wrong side of street as affecting liability for injury by collision with motor vehicle backed from private premises into public street or highway. 63 ALR 2d 141.

DECISIONS UNDER FORMER LAW

No Traffic on Road

The fact that a motorist was driving on the left side of the road was not alone sufficient to show negligence on his part, since where the road is open and free from traffic, the entire road is free for his use. *Harrington v. H. D. Lee Mercantile Co.*, 97 M 40, 62, 33 P 2d 553.

Prima Facie Negligence

A person driving an automobile on the wrong side of the road was prima facie guilty of a violation of former section 32-1101, failing to exercise the precaution necessary to avoid frightening animals

being driven on the road, and thus imperiling the safety of the drivers of such animals. *Savage v. Boyce*, 53 M 470, 473, 164 P 887.

In an action for damages for injuries sustained in a collision between plaintiff's motorcycle and defendant's automobile, the allegation in the complaint that defendant was on the left side of the road at the time of the accident, in disregard of the provision of the statute that vehicles must keep to the right, made out a prima facie charge of negligence. *McGinnis v. Phillips*, 62 M 223, 205 P 215.

32-2152. Passing vehicles proceeding in opposite directions. Drivers of vehicles proceeding in opposite directions shall pass each other to the right, and upon roadways having width for not more than one (1) line of traffic in each direction each driver shall give to the other at least one-half ($\frac{1}{2}$) of the main-traveled portion of the roadway as nearly as possible.

History: En. Sec. 49, Ch. 263, L. 1955.

Collateral References

Automobiles 170(2).
60 C.J.S. Motor Vehicles § 306.

Failure to look for or discover automobile approaching on wrong side of road as negligence or contributory negligence. 145 ALR 536.

DECISIONS UNDER FORMER LAW

Civil Liability

The driver of an automobile, who failed to turn to the right of the way sufficiently to permit a vehicle, coming from the oppo-

site direction, to pass in safety, was at fault, and liable for damages for injury resulting therefrom. *Savage v. Boyce*, 53 M 470, 473, 164 P 887.

32-2153. Overtaking a vehicle on the left. The following rules shall govern the overtaking and passing of vehicles proceeding in the same direction, subject to those limitations, exceptions, and special rules herein-after stated:

(a) The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle.

(b) Except when overtaking and passing on the right is permitted, the driver of an overtaken vehicle shall give way to the right in favor of the overtaking vehicle on audible signal and shall not increase the speed of his vehicle until completely passed by the overtaking vehicle.

History: En. Sec. 50, Ch. 263, L. 1955.

Collateral References

Duties imposed by statute where motor

vehicle driver, passing on left of other vehicle proceeding in same direction, cuts back to the right. 48 ALR 2d 233.

DECISIONS UNDER FORMER LAW

Duty of Overtaken Vehicle

There is no duty resting upon a motorist to slow down his speed when he becomes aware of the fact that another car desires to pass him from the rear, the only requirement being the provisions of this section declaring that he must without unnecessary delay, make every reasonable effort to permit him to do so. Cowden et al. v. Crippen, 101 M 187, 205, 53 P 2d 98.

The driver of an automobile while proceeding in a lawful manner on the proper side of the highway, has the right to assume that one attempting to pass him from the rear, will proceed in a lawful manner and on his own side of the road, as required by this section. Cowden et al. v. Crippen, 101 M 187, 205, 53 P 2d 98.

Duty of Overtaking Vehicle

Plaintiff riding a motorcycle in a city street was endeavoring to pass a truck going in the same direction to the left and sounded the horn; the driver of the truck suddenly turned to the left without giving the warning required by this section,

causing a collision. There was no evidence that plaintiff had time to stop or change his course. Held, that plaintiff was not guilty of contributory negligence as a matter of law. Haney v. Mutual Creamery Co., 67 M 278, 283, 215 P 656.

Under this section, automobile traffic must at all times keep to the right and where two vehicles are moving in the same direction, the one passing must turn to the left and the one being passed must turn to the right; the one passing is negligent if he so carelessly manages his automobile that a collision results, or attempts to pass at a time or under conditions which are not reasonably safe, as where he attempts to pass when another vehicle is approaching. McDonough v. Smith, 86 M 545, 550, 284 P 542.

Ordinarily, the driver of a car overtaking and passing another must keep to the left and not turn to the right until entirely clear of the other car and is in duty bound to look out for the car ahead. McDonough v. Smith, 86 M 545, 550, 284 P 542.

32-2154. When overtaking on right is permitted. (a) The driver of a vehicle may overtake and pass upon the right of another vehicle only under the following conditions:

1. When the vehicle overtaken is making or about to make a left turn;
2. Upon a street or highway with unobstructed pavement not occupied by parked vehicles of sufficient width for two (2) or more lines of moving vehicles in each direction;
3. Upon a one-way street, or upon any roadway on which traffic is restricted to one (1) direction of movement, where the roadway is free from obstructions and of sufficient width for two (2) or more lines of moving vehicles.

(b) The driver of a vehicle may overtake and pass another vehicle upon the right only under conditions permitting such movement in safety. In no event shall such movement be made by driving off the pavement or main-traveled portion of the roadway.

History: En. Sec. 51, Ch. 263, L. 1955.

Collateral References

Reciprocal rights, duties, and liabilities

where driver of motor vehicle attempts to pass on right of other motor vehicle proceeding in same direction. 38 ALR 2d 114.

32-2155. Limitations on overtaking on the left. No vehicle shall be driven to the left side of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction or any vehicle overtaken. In every event the overtaking vehicle must return to the right-hand side of the roadway before coming within one hundred (100) feet of any vehicle approaching from the opposite direction.

History: En. Sec. 52, Ch. 263, L. 1955.

Collateral References

Rights and liabilities as between drivers of motor vehicles proceeding in same

direction, where one or both attempt to pass on left of another vehicle so proceeding. 27 ALR 2d 317.

32-2156. Further limitations on driving to left of center of roadway. (a) No vehicle shall at any time be driven to the left side of the roadway under the following conditions:

1. When approaching the crest of a grade or upon a curve in the highway where the driver's view is obstructed within such distance as to create a hazard in the event another vehicle might approach from the opposite direction;

2. When approaching within one hundred (100) feet of or traversing any intersection or railroad grade crossing;

3. When the view is obstructed upon approaching within one hundred (100) feet of any bridge, viaduct, or tunnel.

(b) The foregoing limitations shall not apply upon a one-way roadway.

History: En. Sec. 53, Ch. 263, L. 1955.

Intersection

Reading sections 32-2114 and 32-2115 (prior to the 1959 amendment of section 32-2114) together, an intersection, within the meaning of this section, is formed by the joining of two ways publicly maintained which are open to the public for vehicular travel. *Leach v. Great Northern Ry. Co.*, — M —, 360 P.2d 94.

Collateral References

Construction and applicability of traffic regulation prohibiting vehicle from passing another at street or highway intersection. 53 ALR 2d 850.

Construction and application of statutes regulating or forbidding passing on hill by vehicle. 60 ALR 2d 211.

32-2157. No-passing zones. (a) The commission is hereby authorized to determine those portions of any highway where overtaking and passing or driving to the left of the roadway would be especially hazardous and may by appropriate signs or markings on the roadway indicate the beginning and end of such zones and when such signs or markings are in place and clearly visible to an ordinarily observant person every driver of a vehicle shall obey the directions thereof.

(b) Where signs or markings are in place to define a no-passing zone as set forth in paragraph (a) no driver shall at any time drive on the left side of the roadway within such no-passing zone or on the left side of any pavement striping designed to mark such no-passing zone throughout its length.

History: En. Sec. 54, Ch. 263, L. 1955; amd. Sec. 1, Ch. 97, L. 1957.

32-2158. One-way roadways and rotary traffic islands. (a) The commission may designate any highway or any separate roadway under its jurisdiction for one-way traffic and shall erect appropriate signs giving notice thereof.

(b) Upon a roadway designated and signposted for one-way traffic a vehicle shall be driven only in the direction designated.

(c) A vehicle passing around a rotary traffic island shall be driven only to the right of such island.

History: En. Sec. 55, Ch. 263, L. 1955.

32-2159. Driving on roadways laned for traffic. Whenever any roadway has been divided into two (2) or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply.

(a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

(b) Upon a roadway which is divided into three (3) lanes a vehicle shall not be driven in the center lane except when overtaking and passing another vehicle where the roadway is clearly visible and such center lane is clear of traffic within a safe distance, or in preparation for a left turn or where such center lane is at the time allocated exclusively to traffic moving in the direction the vehicle is proceeding and is signposted to give notice of such allocation.

(c) Official signs may be erected directing slow-moving traffic to use a designated lane or designating those lanes to be used by traffic moving in a particular direction regardless of the center of the roadway and drivers of vehicles shall obey the directions of every such sign.

History: En. Sec. 56, Ch. 263, L. 1955.

32-2160. Following too closely. (a) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.

(b) The driver of any truck-tractor, truck or motor vehicle drawing another vehicle when traveling upon a roadway outside of a business or residence district and which is following another truck-tractor, truck or motor vehicle drawing another vehicle shall, whenever conditions permit, leave sufficient space so that an overtaking vehicle may enter and occupy such space without danger, except that this shall not prevent a truck-tractor, truck or motor vehicle drawing another vehicle from overtaking and passing any like vehicle or other vehicle.

(c) Motor vehicles being driven upon any roadway outside of a business or residence district in a caravan or motorcade whether or not towing other vehicles shall be so operated as to allow sufficient space between each such vehicle or combination of vehicles so as to enable any other vehicle to enter and occupy such space without danger. This provision shall not apply to funeral processions.

History: En. Sec. 57, Ch. 263, L. 1955.

DECISIONS UNDER FORMER LAW

Following Closely as Negligence

Driving an automobile at a rapid rate of speed so close to a car ahead that, if the driver of the latter slows down, it becomes necessary for the driver of the

first to turn to the left to avoid striking it, is negligence, particularly when in doing so he must turn in front of a car coming from the opposite direction. *McDonough v. Smith*, 86 M 545, 550, 284 P 542.

32-2161. Driving on divided highways. Whenever any highway has been divided into two (2) roadways by leaving an intervening space or by physical barrier or clearly indicated dividing section so constructed as to impede vehicular traffic, every vehicle shall be driven only upon the right-hand roadway and no vehicle shall be driven over, across, or within any such dividing space, barrier, or section except through an opening in such physical barrier or dividing section or space or at a crossover or intersection established by public authority.

History: En. Sec. 58, Ch. 263, L. 1955.

32-2162. Restricted access. No person shall drive a vehicle onto or from any controlled access roadway except at such entrances and exits as are established by public authority.

History: En. Sec. 59, Sec. 263, L. 1955.

32-2163. Restrictions on use of controlled access roadway. The commission may by resolution or order entered in its minutes, and local authorities may by ordinance with respect to any controlled access roadway under their respective jurisdictions prohibit the use of any such roadway by pedestrians, bicycles, or other nonmotorized traffic or by any person operating a motor-driven cycle.

The commission or the local authority adopting any such prohibitory regulation shall erect and maintain official signs on the controlled access roadway on which such regulations are applicable and when so erected no person shall disobey the restrictions stated on such signs.

History: En. Sec. 60, Ch. 263, L. 1955.

32-2164. Required position and method of turning at intersections. The driver of a vehicle intending to turn at an intersection shall do so as follows:

(a) **Right Turns.** Both the approach for a right turn and a right turn shall be made as close as practicable to the right-hand curb or edge of the roadway.

(b) **Left Turn on Two-Way Roadways.** At any intersection where traffic is permitted to move in both directions on each roadway entering the intersection, an approach for a left turn shall be made in that portion of the right half of the roadway nearest the center line thereof and by passing to the right of such center line where it enters the intersection and after entering the intersection the left turn shall be made so as to leave the intersection to the right of the center line of the roadway being entered. Whenever practicable the left turn shall be made in that portion of the intersection to the left of the center of the intersection.

(c) **Left Turns on Other Than Two-Way Roadways.** At any intersection where traffic is restricted to one (1) direction on one (1) or more of the roadways, the driver of a vehicle intending to turn left at any such intersection shall approach the intersection in the extreme left-hand lane lawfully available to traffic moving in the direction of travel of such vehicle and after entering the intersection the left turn shall be made so as to leave the intersection, as nearly as practicable, in the left-hand lane lawfully available to traffic moving in such direction upon the roadway being entered.

(d) **Placing of Markers, Buttons and Signs.**

1. Local authorities in their respective jurisdictions may cause markers, buttons, or signs to be placed within or adjacent to intersections and thereby require and direct that a different course from that specified in this section be traveled by vehicles turning at an intersection, and when markers, buttons, or signs are so placed no driver of a vehicle shall turn a vehicle at an intersection other than as directed and required by such markers, buttons, or signs.

History: En. Sec. 61, Ch. 263, L. 1955.

Compiler's Note

Sections 32-2164 to 32-2169 comprised Article VII of Ch. 263, Laws 1955 entitled "Turning and Starting and Signals on Stopping and Turning."

Collateral References

Automobiles § 169.
40 C.J.S. Highways § 239; 60 C.J.S. Motor Vehicles §§ 300, 303, 350-370.
5A Am. Jur. 467, Automobiles and Highway Traffic, §§ 386-392.

DECISIONS UNDER FORMER LAW

Cutting Corners

The driver of a motor vehicle who, in violation of statute and city ordinance, cuts a corner at a street intersection and enters the wrong side of the street, whereby a traveler is injured, is guilty of negligence per se. *March v. Ayers*, 80 M 401, 410, 260 P 702.

Strict Compliance Impracticable

In an action by a pedestrian against the driver of an automobile for personal injuries sustained at a street crossing, an in-

struction based upon subdivisions 1 and 2 of former section 32-1102, requiring the latter in turning corners to keep close to the curb, was prejudicially erroneous where the presence of a telephone pole in the highway about six feet from the curb near the point of the accident rendered it impossible for the driver to obey the mandate of the statute, its provisions being elastic, not rigid, to be applied in the light of physical conditions existing in the avenues of traffic. *McGregor v. Weinstein*, 70 M 340, 343, 225 P 615.

32-2165. Turning on curve or crest of grade prohibited. No vehicle shall be turned so as to proceed in the opposite direction upon any curve, or upon the approach to, or near the crest of a grade, where such vehicle cannot be seen by the driver of any other vehicle approaching from either direction within five hundred (500) feet.

History: En. Sec. 62, Ch. 263, L. 1955.

Collateral References

Liability arising from collision of auto-

mobile making U-turn and another vehicle. 6 ALR 2d 1250.

32-2166. Starting parked vehicle. No person shall start a vehicle which is stopped, standing, or parked unless and until such movement can be made with reasonable safety.

History: En. Sec. 63, Ch. 263, L. 1955.

Collateral References

Liability for injury or damage growing

out of movement by parked automobile onto rural highway from shoulder. 29 ALR 2d 128.

Liability for injury occurring when caught as vehicle is put in motion. 43
clothing of one outside motor vehicle is ALR 2d 1282.

32-2167. Turning movements and required signals. (a) No person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required by section 32-2164 or turn a vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety. No person shall so turn any vehicle without giving an appropriate signal in the manner hereinafter provided in the event any other traffic may be affected by such movement.

(b) A signal of intention to turn right or left when required shall be given continuously during not less than the last one hundred (100) feet traveled by the vehicle before turning.

(c) No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided herein to the driver of any vehicle immediately to the rear when there is opportunity to give such signal.

History: En. Sec. 64, Ch. 263, L. 1955.

Collateral References

Sudden or unsignaled stop or slowing of motor vehicle as negligence. 29 ALR 2d 5.

Forward vehicle turning to right as affecting reciprocal rights, duties, and liabilities where driver of motor vehicle attempts to pass on right of motor vehicle proceeding in same direction. 38 ALR 2d 129.

Violation of statute by motorist's failure to give signal for right turn. 38 ALR 2d 151.

Violation of statute by motorist's failure to give signal for left turn at intersection

with respect to motor vehicle proceeding in same direction. 39 ALR 2d 32.

Violation of statute by motorist's failure to give signal for left turn at intersection with respect to oncoming or intersecting motor vehicle. 39 ALR 2d 81.

Violation of statute by motorist's failure to give signal for left turn between intersections. 39 ALR 2d 118.

Extension of hand or arm from motor vehicle to give statutory signal as contributory negligence. 40 ALR 2d 245.

Duty and liability as to giving following driver warning of approaching danger. 48 ALR 2d 252.

32-2168. Signals by hand and arm or signal device. (a) Any stop or turn signal when required herein shall be given either by means of the hand and arm or by a signal lamp or lamps, except as otherwise provided in paragraph (b).

(b) Any motor vehicle in use on a highway shall be equipped with, and required signal shall be given by, a signal lamp or lamps when the distance from the center of the top of the steering post to the left outside limit of the body, cab, or load of such motor vehicle exceeds twenty-four (24) inches, or when the distance from the center of the top of the steering post to the rear limit of the body or load thereof exceeds fourteen (14) feet. The latter measurement shall apply to any single vehicle, also to any combination of vehicles.

History: En. Sec. 65, Ch. 263, L. 1955;
amd. Sec. 1, Ch. 105, L. 1957.

32-2169. Method of giving hand-and-arm signals. All signals herein required given by hand and arm shall be given from the left side of the vehicle in the following manner and such signals shall indicate as follows:

1. Left Turn. Hand and arm extended horizontally.
2. Right Turn. Hand and arm extended upward.
3. Stop or Decrease Speed. Hand and arm extended downward.

History: En. Sec. 66, Ch. 263, L. 1955.

32-2170. Vehicle approaching or entering intersection. (a) The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway.

(b) When two (2) vehicles enter an intersection from different highways at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right.

(c) The right of way rules declared in paragraphs (a) and (b) are modified at through highways and otherwise as hereinafter stated in this article.

History: En. Sec. 67, Ch. 263, L. 1955.

Compiler's Note

Sections 32-2170 to 32-2175 comprised Article VIII of Ch. 263, Laws 1955 entitled "Rights of Way."

Collateral References

Automobiles 170-170(17).

60 C.J.S. Motor Vehicles §§ 362-364.

5A Am. Jur. 412, Automobiles and Highway Traffic, §§ 296-328.

Duty of vehicle driver approaching intersection of one-way street with other street. 62 ALR 2d 275.

32-2171. Vehicle turning left at intersection. The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard, but said driver, having so yielded and having given a signal when and as required by this act, may make such left turn and the drivers of all other vehicles approaching the intersection from said opposite direction shall yield the right of way to the vehicle making the left turn. The provisions of this section shall not be applicable where it is otherwise directed by appropriate signs or signals.

History: En. Sec. 68, Ch. 263, L. 1955.

32-2172. Vehicle entering through highway or stop intersection. (a) The driver of a vehicle shall stop as required by section 32-2195 at the entrance to a through highway and shall yield the right of way to other vehicles which have entered the intersection from said through highway or which are approaching so closely on said through highway as to constitute an immediate hazard but said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on said through highway shall yield the right of way to the vehicle so proceeding into or across the through highway.

(b) The driver of a vehicle shall likewise stop in obedience to a stop sign as required herein at an intersection where a stop sign is erected at one (1) or more entrances thereto although not a part of a through highway and shall proceed cautiously, yielding to vehicles not so obliged

to stop which are within the intersection or approaching so closely as to constitute an immediate hazard, but may then proceed.

History: En. Sec. 69, Ch. 263, L. 1955; amd. Sec. 3, Ch. 169, L. 1957.

Collateral References

Right and duty of motorist on through, favored, or arterial street or highway to proceed where lateral view at intersection

is obstructed by physical obstacle. 59 ALR 2d 1202.

Motorist's liability for collision at intersection of ordinary and arterial highways as affected by absence, displacement, or malfunctioning of stop sign or other traffic signal. 74 ALR 2d 242.

32-2173. Vehicle entering highway from private road or driveway. The driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right of way to all vehicles approaching on said highway.

History: En. Sec. 70, Ch. 263, L. 1955.

DECISIONS UNDER FORMER LAW

Intersection Rules Inapplicable

The word "crossing" as used in former section 32-1102, with relation to the duty of drivers at crossings, referred to the intersection of a highway and a railroad or of two highways, and therefore an instruction based upon that section offered

by defendant, through whose negligence in driving on a private way across the highway with the intention of entering a gate on the opposite side, plaintiff was injured, was properly refused as not applicable. *Knott v. Pepper*, 74 M 236, 243, 239 P 1037.

32-2174. Vehicles approaching "Yield Right of Way" sign. When the intersection is designated by the commission, or the local authority having jurisdiction, as a "Yield Right of Way" intersection, the driver of a vehicle approaching the "Yield Right of Way" sign shall slow to a speed of not more than fifteen (15) miles per hour and yield right of way to all vehicles approaching from the right or left on the intersecting roads, or streets, which are so close as to constitute an immediate hazard. If a driver is involved in a collision at an intersection or interferes with the movement of other vehicles after driving past a "Yield Right of Way" sign, such collision or interference shall be deemed evidence of the driver's failure to yield right of way.

History: En. Sec. 71, Ch. 263, L. 1955.

32-2175. Operation of vehicles on approach of authorized emergency vehicles. (a) Upon the immediate approach of an authorized emergency vehicle making use of audible and visual signals meeting the requirements of section 32-21-132, or of a police vehicle properly and lawfully making use of an audible signal only, the driver of every other vehicle shall yield the right of way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the roadway clear of any intersection and shall stop and remain in such position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer or highway patrolman.

(b) This section shall not operate to relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway.

History: En. Sec. 72, Ch. 263, L. 1955; amd. Sec. 4, Ch. 169, L. 1957.

5A Am. Jur. 281, 415, Automobiles and Highway Traffic, §§ 77, 299, 300.

Collateral References

Automobiles—175-175(5).

60 C.J.S. Motor Vehicles §§ 371-377.

Validity of statute or ordinance giving right of way in streets or highways to certain classes of vehicles. 38 ALR 24.

32-2176. Pedestrians subject to traffic regulations. (a) Pedestrians shall be subject to traffic-control signals at intersections as provided in section 32-2137 unless required by local ordinance to comply strictly with such signals, but at all other places pedestrians shall be accorded the privileges and shall be subject to the restrictions stated in sections 32-2176 to 32-2183.

(b) Local authorities are hereby empowered by ordinance to require that pedestrians shall strictly comply with the directions of any official traffic-control signal and may by ordinance prohibit pedestrians from crossing any roadway in a business district or any designated highways except in a crosswalk.

History: En. Sec. 73, Ch. 263, L. 1955.

Compiler's Note

Sections 32-2176 to 32-2183 comprised Article IX of Ch. 263, Laws 1955 entitled "Pedestrians' Rights and Duties."

Collateral References

Automobiles—160-160(6).

60 C.J.S. Motor Vehicles §§ 382-389.

5A Am. Jur. 514, Automobiles and Highway Traffic, §§ 446-473.

Who is "pedestrian" with respect to rights given, and duties imposed, by traffic rules and regulations. 30 ALR 2d 866.

32-2177. Pedestrians' right of way in crosswalk. (a) When traffic-control signals are not in place or not in operation the driver of a vehicle shall yield the right of way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within a crosswalk when the pedestrian is upon the half of the roadway upon which the vehicle is traveling, or when the pedestrian is approaching so closely from the opposite half of the roadway as to be in danger, but no pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the driver to yield. This provision shall not apply under the conditions stated in section 32-2178(b).

(b) Whenever any vehicle is stopped at a marked crosswalk or at any unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway, the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle.

History: En. Sec. 74, Ch. 263, L. 1955.

32-2178. Crossing at other than crosswalks. (a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway.

(b) Any pedestrian crossing a roadway at a point where a pedestrian tunnel or overhead pedestrian crossing has been provided shall yield the right of way to all vehicles upon the roadway.

(c) Between adjacent intersections at which traffic-control signals

are in operation pedestrians shall not cross at any place except in a marked crosswalk.

History: En. Sec. 75, Ch. 263, L. 1955.

Care Required of Pedestrian

Pedestrian must use ordinary care for his own safety in attempting to cross highway. *Hightower v. Alley*, 132 M 349, 318 P 2d 243, 247.

Last Clear Chance

Decedent, who was killed while crossing highway, did not come into a position of peril any appreciable length of time be-

fore the injury. Had he stood still, defendant would have avoided striking him. The evidence showed that it was the sudden running of deceased into the moving automobile that produced his injuries and death. Under the evidence defendant had no reasonable opportunity to avoid striking decedent after he took the perilous step. Under such circumstances an instruction on last clear chance had no place in the case. *Hightower v. Alley*, 132 M 349, 318 P 2d 243, 248.

DECISIONS UNDER FORMER LAW

Care Required of Pedestrian

In an action for personal injuries sustained in an automobile accident on a city street in which it appeared that plaintiff was struck while attempting to cross a business street between crossings, the court erred in refusing defendant's offered instruction to the effect that greater caution is required of a pedestrian where he crosses between crossings than at crossings, and that automobiles must be more cautious at crossings than between crossings, although ordinary caution must be observed by drivers and pedestrians at and between crossings, such instruction having been in harmony with the law declared by subdivision 1 of former section 32-1102, and applicable to the conditions presented. *Carey v. Guest*, 78 M 415, 429, 258 P 236.

Duty of Drivers

Pedestrians and automobiles have equal rights in the use of streets or highways in the exercise of which pedestrians are

required to use ordinary care for their own safety, and the driver of an automobile must operate it in a careful and prudent manner and at a rate of speed no greater than is reasonable and proper under existing traffic and road conditions and the requirements of city ordinances. *McKeon v. Kilduff*, 85 M 562, 568, 281 P 345. See also *Green v. Bohm*, 65 M 399, 211 P 320.

Questions of Fact

Under the evidence presented, it was a jury question as to whether defendant acted as a reasonably prudent person would have acted under all the circumstances in traveling at the point of collision at the speed of 18 or 20 miles per hour, as she admitted, even though the streetcar had not come to a full stop when defendant met it. Whether, in the exercise of reasonable care, she should have seen plaintiff in time to avoid the collision, was for the jury. *Hill v. Haller*, 108 M 251, 261, 90 P 2d 977.

32-2179. Drivers to exercise due care. Notwithstanding the foregoing provisions of sections 32-2176 to 32-2183 every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway.

History: En. Sec. 76, Ch. 263, L. 1955.

Collateral References

Collision with pedestrian due to swaying or swinging of motor vehicle or trailer. 1 ALR 2d 167.

Liability for injury to pedestrian growing out of pulling out of parked motor vehicle. 29 ALR 2d 136.

Duty of motor vehicle driver approaching place where children are playing or gathered. 30 ALR 2d 5.

Application of "assured clear distance ahead" or "radius of lights" doctrine to accident involving pedestrian crossing street or highway. 31 ALR 2d 1424.

32-2180. Pedestrians to use right half of crosswalk. Pedestrians shall move, whenever practicable, upon the right half of crosswalks.

History: En. Sec. 77, Ch. 263, L. 1955.

32-2181. Pedestrians on roadways. (a) Where sidewalks are provided it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway.

(b) Where sidewalks are not provided any pedestrian walking along and upon a highway shall, when practicable, walk only on the left side of the roadway or its shoulder facing traffic which may approach from the opposite direction.

History: En. Sec. 78, Ch. 263, L. 1955.

Collateral References

Failure to comply with statute regulat-

ing travel by pedestrian along highway as affecting right to recovery. 4 ALR 2d 1253.

32-2182. Pedestrian soliciting rides or business. (a) No person shall stand in a roadway for the purpose of soliciting a ride, employment, or business from the occupant of any vehicle.

(b) No person shall stand on or in proximity to a street or highway for the purpose of soliciting the watching or guarding of any vehicle while parked or about to be parked on a street or highway.

History: En. Sec. 79, Ch. 263, L. 1955.

Collateral References

Anti-hitchhiking laws: their construc-

tion and effect in action for injury to hitchhiker. 18 ALR 2d 1447.

32-2183. Intoxicated pedestrian. No person shall walk upon or along the highway while under the influence of intoxicating liquor.

History: En. Sec. 80, Ch. 263, L. 1955.

Collateral References

Pedestrian's intoxication as affecting liability of municipality for breach of duty

as to barriers for protection of adult pedestrians who may unintentionally deviate from street or highway into marginal or external hazards. 44 ALR 2d 655.

32-2184. Effect of regulations. (a) It is a misdemeanor for any person to do any act forbidden or fail to perform any act required in sections 32-2184 to 32-2190.

(b) These regulations applicable to bicycles shall apply whenever a bicycle is operated upon any highway or upon any path set aside for the exclusive use of bicycles subject to those exceptions stated herein.

History: En. Sec. 81, Ch. 263, L. 1955.

Compiler's Note

Sections 32-2184 to 32-2190 comprised Article X of Ch. 263, Laws 1955 entitled "Operation of Bicycles and Play Vehicles."

Collateral References

Highways \S 169.
40 C.J.S. Highways \S 235.
25 Am. Jur. 501, Highways, \S 205.

32-2185. Traffic laws apply to persons riding bicycles. Every person riding a bicycle upon a roadway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle by this act, except as to special regulations in sections 32-2184 to 32-2190 and except as to those provisions of this act which by their very nature can have no application.

History: En. Sec. 82, Ch. 263, L. 1955.

Collateral References

Person pushing bicycle as "pedestrian"

with respect to rights given, and duties imposed, by traffic rules and regulations. 30 ALR 2d 871.

32-2186. Riding on bicycles. A person propelling a bicycle shall not ride other than upon or astride a permanent and regular seat attached thereto.

History: En. Sec. 83, Ch. 263, L. 1955.

32-2187. Clinging to vehicles. No person riding upon any bicycle, coaster, roller skates, sled, or toy vehicle shall attach the same or himself to any vehicle upon a roadway.

History: En. Sec. 84, Ch. 263, L. 1955.

32-2188. Riding on roadways and bicycle paths. (a) Every person operating a bicycle upon a roadway shall ride as near to the right side of the roadway as practicable, exercising due care when passing a standing vehicle or one proceeding in the same direction.

(b) Persons riding bicycles upon a roadway shall not ride more than two (2) abreast except on paths or parts of roadways set aside for the exclusive use of bicycles.

(c) Whenever a usable path for bicycles has been provided adjacent to a roadway, bicycle riders shall use such path and shall not use the roadway.

History: En. Sec. 85, Ch. 263, L. 1955.

32-2189. Carrying articles. No person operating a bicycle shall carry any package, bundle, or article which prevents the driver from keeping at least one (1) hand upon the handle bars.

History: En. Sec. 86, Ch. 263, L. 1955.

32-2190. Lamps and other equipment on bicycles. (a) Every bicycle when in use at nighttime shall be equipped with a lamp on the front which shall emit a white light visible from a distance of at least five hundred (500) feet to the front and with a red reflector on the rear of a type approved by the board which shall be visible from all distances from fifty (50) feet to three hundred (300) feet to the rear when directly in front of lawful upper beams of head lamps on a motor vehicle. A lamp emitting a red light visible from a distance of five hundred (500) feet to the rear may be used in addition to the red reflector.

(b) Every bicycle shall be equipped with a brake which will enable the operator to make the braked wheels skid on dry, level, clean pavement.

History: En. Sec. 87, Ch. 263, L. 1955.

32-2191. Obedience to signal indicating approach of train. (a) Whenever any person driving a vehicle approaches a railroad grade crossing under any of the circumstances stated in this section, the driver of such vehicle shall stop within fifty (50) feet but not less than fifteen (15) feet from the nearest rail of such railroad, and shall not proceed until he can do so safely. The foregoing requirements shall apply when:

1. A clearly visible electric or mechanical signal device gives warning of the immediate approach of a railroad train;

2. A crossing gate is lowered or when a human flagman gives or continues to give a signal of the approach or passage of a railroad train;

3. A railroad train approaching within approximately one thousand five hundred (1,500) feet of the highway crossing emits a signal audible from such distance and such railroad train, by reason of its speed or nearness to such crossing, is an immediate hazard;

4. An approaching railroad train is plainly visible and is in hazardous proximity to such crossing.

(b) No person shall drive any vehicle through, around, or under any crossing gate or barrier at a railroad crossing while such gate or barrier is closed or is being opened or closed.

History: En. Sec. 88, Ch. 263, L. 1955.

Compiler's Note

Sections 32-2191 to 32-2198 comprised Article XI of Ch. 263, Laws 1955 entitled "Special Stops Required."

Collateral References

Highways \Rightarrow 178.
75 C.J.S. Railroads §§ 772-775.
5A Am. Jur. 464, Automobiles and Highway Traffic, §§ 376-378.

32-2192. All vehicles must stop at certain railroad grade crossings. The commission and local authorities are hereby authorized to designate particularly dangerous highway grade crossings of railroads and to erect stop signs thereat. When such stop signs are erected the driver of any vehicle shall stop within fifty (50) feet but not less than fifteen (15) feet from the nearest rail of such railroad and shall proceed only upon exercising due care.

History: En. Sec. 89, Ch. 263, L. 1955.

32-2193. Certain vehicles must stop at all railroad grade crossings. (a) The driver of any motor vehicle carrying passengers for hire, or of any school bus carrying any school child, or of any vehicle carrying explosive substances or flammable liquids as a cargo or part of a cargo, before crossing at grade any track or tracks of a railroad, shall stop such vehicle within fifty (50) feet but not less than fifteen (15) feet from the nearest rail of such railroad and while so stopped shall listen and look in both directions along such track for any approaching train, and for signals indicating the approach of a train, except as hereinafter provided, and shall not proceed until he can do so safely. After stopping as required herein and upon proceeding when it is safe to do so the driver of any said vehicle shall cross only in such gear of the vehicle that there will be no necessity for changing gears while traversing such crossings and the driver shall not shift gears while crossing the track or tracks.

(b) No stop need be made at any such crossing where a police officer or highway patrolman or traffic-control signal directs traffic to proceed.

(c) This section shall not apply at street-railway grade crossings within a business or residence district.

History: En. Sec. 90, Ch. 263, L. 1955.

Collateral References

Automobiles \Rightarrow 147.
60 C.J.S. Motor Vehicles § 248.

32-2194. Moving heavy equipment at railroad grade crossings. (a) No person shall operate or move any crawler-type tractor, steam shovel, der-

rick, roller or any equipment or structure having a normal operating speed of ten (10) or less miles per hour or a vertical body or load clearance of less than one-half ($\frac{1}{2}$) inch per foot of the distance between any two (2) adjacent axles or in any event of less than nine (9) inches, measured above the level surface of a roadway, upon or across any tracks at a railroad grade crossing without first complying with this section.

(b) Notice of any such intended crossing shall be given to a station agent of such railroad and reasonable time be given to such railroad to provide proper protection at such crossing.

(c) Before making any such crossing the person operating or moving any such vehicle or equipment shall first stop the same not less than fifteen (15) feet nor more than fifty (50) feet from the nearest rail of such railroad and while so stopped shall listen and look in both directions along such track for any approaching train and for signals indicating the approach of a train, and shall not proceed until the crossing can be made safely.

(d) No such crossing shall be made when warning is given by automatic signal or crossing gates or a flagman or otherwise of the immediate approach of a railroad train or car. If a flagman is provided by the railroad, movement over the crossing shall be under his direction.

History: En. Sec. 91, Ch. 263, L. 1955.

32-2195. Vehicles must stop at stop signs. (a) The commission with reference to state highways and local authorities with reference to other highways under their jurisdiction may designate through highways and erect stop signs at specified entrances thereto or may designate any intersection as a stop intersection and erect like signs at one (1) or more entrances to such intersection.

(b) Every said sign shall bear the word "Stop" in letters not less than eight (8) inches in height and such sign shall at nighttime be rendered luminous by steady or flashing internal illumination, or by a fixed floodlight projected on the face of the sign, or by efficient reflecting elements on the face of the sign.

(c) Every stop sign shall be erected as near as practicable to the nearest line of the crosswalk on the near side of the intersection or, if there is no crosswalk, then as close as practicable to the nearest line of the roadway.

(d) Every driver of a vehicle approaching a stop sign shall stop before entering the crosswalk on the near side of the intersection or in the event there is no crosswalk shall stop at a clearly marked stop line, but if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection except when directed to proceed by a police officer or highway patrolman or traffic-control signal.

History: En. Sec. 92, Ch. 263, L. 1955.

Collateral References

Highways \Rightarrow 165, 186.

40 C.J.S. Highways §§ 232, 247.

32-2196. Stop before emerging from alley, driveway, or building. The driver of a vehicle within a business or residence district emerging from

an alley, driveway, or building, shall stop such vehicle immediately prior to driving onto a sidewalk or onto the sidewalk area extending across any alleyway or driveway and shall yield the right of way to any pedestrian as may be necessary to avoid collision, and upon entering the roadway shall yield the right of way to all vehicles approaching on said roadway.

History: En. Sec. 93, Ch. 263, L. 1955.

32-2197. Overtaking and passing school bus. (a) The driver of a vehicle upon a highway outside the corporate limits of any city or town upon meeting or overtaking from either direction any school bus which has stopped on the highway for the purpose of receiving or discharging any school children shall stop the vehicle before reaching such school bus when there is in operation on said bus a visual signal as specified in section 32-21-132 and said driver shall not proceed until such school bus resumes motion, or is signaled by the school bus driver to proceed as the visual signals are no longer actuated.

(b) Every bus used for the transportation of school children shall bear upon the front and rear thereof plainly visible signs containing the words "SCHOOL BUS" in letters not less than eight (8) inches in height, and in addition shall be equipped with visual signals meeting the requirements of section 32-21-132, which shall be actuated by the driver of said school bus whenever but only whenever such vehicle is stopped on the highway for the purpose of receiving or discharging school children.

(c) When a school bus is being operated upon a highway for purposes other than the actual transportation of children either to or from school all markings thereon indicating "SCHOOL BUS" shall be covered or concealed.

(d) The driver of a vehicle upon a highway with separate roadways need not stop upon meeting or passing a school bus which is on a different roadway or when upon a controlled access highway and the school bus is stopped in a loading zone which is a part of or adjacent to such highway and where pedestrians are not permitted to cross the roadway.

History: En. Sec. 94, Ch. 263, L. 1955;
amd. Sec. 1, Ch. 100, L. 1961.

Cross-Reference

For other school bus regulations, secs.
75-3308 to 75-3311.

32-2198. Special lighting equipment on school buses. It shall be unlawful to operate any flashing warning signal light on any school bus except when any said school bus is stopped on a highway for the purpose of permitting school children to board or alight from said school bus.

History: En. Sec. 95, Ch. 263, L. 1955.

Cross-Reference

For other school bus regulations, secs.
75-3308 to 75-3311.

32-2199. Stopping, standing, or parking outside of business or residence districts. (a) Upon any highway outside of a business or residence district no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or main-traveled part of the highway when it is practical to stop, park, or so leave such vehicle off

such part of said highway, but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles; and no person shall stop, stand or park any vehicle upon such highway unless such vehicle can be seen by the driver of any other vehicle approaching, from either direction, within five hundred (500) feet and unless drivers approaching from opposite directions are visible to each other when both are at least five hundred (500) feet from the vehicle to be stopped, turned or parked, except in cases of justifiable emergency.

(b) This section shall not apply to the driver of any vehicle which is disabled while on the paved or main-traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle in such position.

History: En. Sec. 96, Ch. 263, L. 1955.

Compiler's Note

Sections 32-2199 to 32-21-102 comprised Article XII of Ch. 263, Laws 1955 entitled "Stopping, Standing, and Parking."

Collateral References

Automobiles ~~§~~ 173-173(8).
60 C.J.S. Motor Vehicles §§ 329-338.
5A Am. Jur. 476, Automobiles and Highway Traffic, §§ 401-418.

When is motor vehicle "disabled" or the like within exception to statute regulating parking or stopping. 15 ALR 2d 909.

DECISIONS UNDER FORMER LAW

Disabled Vehicle

Where truck had run out of gas, its driver was negligent in not removing the vehicle from the highway when the op-

erator of a passing vehicle offered to assist. Burns v. Fisher, 132 M 26, 313 P 2d 1044, 1048, 67 ALR 2d 1.

32-21-100. Officers or highway patrolmen authorized to remove illegally stopped vehicles. (a) Whenever any police officer or highway patrolman finds a vehicle standing upon a highway in violation of any of the foregoing provisions of sections 32-2199 to 32-21-102 such officer or highway patrolman is hereby authorized to move such vehicle, or require the driver or other person in charge of the vehicle to move the same, to a position off the paved or main-traveled part of such highway.

(b) Whenever any police officer or highway patrolman finds a vehicle unattended upon any bridge or causeway or in any tunnel where such vehicle constitutes an obstruction to traffic, such officer or highway patrolman is hereby authorized to provide for the removal of such vehicle to the nearest place of safety.

History: En. Sec. 97, Ch. 263, L. 1955.

32-21-101. Stopping, standing, or parking prohibited in specified places.

(a) No person shall stop, stand, or park a vehicle, except when necessary to avoid conflict with other traffic or in compliance with law or the directions of a police officer or highway patrolman or traffic-control device, in any of the following places:

1. On a sidewalk;
2. In front of a public or private driveway;
3. Within an intersection;

4. Within fifteen (15) feet of a fire hydrant;
5. On a crosswalk;
6. Within twenty (20) feet of a crosswalk at an intersection;
7. Within thirty (30) feet upon the approach to any flashing beacon, stop sign, or traffic-control signal located at the side of a roadway;
8. Between a safety zone and the adjacent curb or within thirty (30) feet of points on the curb immediately opposite the ends of a safety zone, unless the local authorities indicate a different length by signs or markings;
9. Within fifty (50) feet of the nearest rail of a railroad crossing;
10. Within twenty (20) feet of the driveway entrance to any fire station and on the side of a street opposite the entrance to any fire station within seventy-five (75) feet of said entrance when properly signposted;
11. Alongside or opposite any street excavation or obstruction when stopping, standing, or parking would obstruct traffic;
12. On the roadway side of any vehicle stopped or parked at the edge or curb of a street;
13. Upon any bridge or other elevated structure upon a highway or within a highway tunnel;
14. At any place where official signs prohibit stopping.

(b) No person shall move a vehicle not lawfully under his control into any such prohibited area or away from a curb such distance as is unlawful.

History: En. Sec. 98, Ch. 263, L. 1955.

32-21-102. Additional parking regulations. (a) Except as otherwise provided in this section every vehicle stopped or parked upon a roadway where there are adjacent curbs shall be so stopped or parked with the right-hand wheels of such vehicle parallel to and within eighteen (18) inches of the right-hand curb.

(b) Local authorities may by ordinance permit parking of vehicle with the left-hand wheels adjacent to and within eighteen (18) inches of the left-hand curb of a one-way roadway.

(c) Local authorities may by ordinance permit angle parking on any roadway, except that angle parking shall not be permitted on any federal-aid or state highway unless the commission has determined by resolution or order entered in its minutes that the roadway is of sufficient width to permit angle parking without interfering with the free movement of traffic.

(d) The commission with respect to highways under its jurisdiction may place signs prohibiting or restricting the stopping, standing, or parking of vehicles on any highway where in its opinion, as evidenced by resolution or order entered in its minutes, such stopping, standing, or parking, is dangerous to those using the highway or where the stopping, standing, or parking of vehicles would unduly interfere with the free movement of traffic thereon. Such signs shall be official signs and no

person shall stop, stand, or park any vehicle in violation of the restrictions stated on such signs.

History: En. Sec. 99, Ch. 263, L. 1955.

Collateral References

Construction and effect in civil actions

of statute, ordinance or regulation requiring vehicles to be stopped or parked parallel with, and within certain distances of, curb. 17 ALR 2d 582.

32-21-103. Unattended motor vehicles. No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, and effectively setting the brake thereon and, when standing upon any grade, turning the front wheels to the curb or side of the highway in such a manner as to prevent the vehicle from rolling onto the roadway.

History: En. Sec. 100, Ch. 263, L. 1955.

Compiler's Note

Sections 32-21-103 to 32-21-113 comprised Article XIII of Ch. 263, Laws 1955 entitled "Miscellaneous Rules."

Collateral References

Liability for injury or damage caused

by accidental starting up of parked motor vehicle. 16 ALR 2d 979.

Liability for damage or injury by stranger starting motor vehicle left parked on street as affected by violation of statute or ordinance. 51 ALR 2d 639.

Liability of owner or operator to adult trespasser in or on standing motor vehicle or equipment. 65 ALR 2d 798.

32-21-104. Limitations on backing. The driver of a vehicle shall not back the same unless such movement can be made with reasonable safety and without interfering with other traffic.

History: En. Sec. 101, Ch. 263, L. 1955.

Collateral References

Liability for injury occasioned by back-

ing of motor vehicle in public street or highway. 63 ALR 2d 5.

32-21-105. Riding on motorcycles. A person operating a motorcycle shall ride only upon the permanent and regular seat attached thereto, and such operator shall not carry any other person nor shall any other person ride on a motorcycle unless such motorcycle is designed to carry more than one (1) person, in which event a passenger may ride upon the permanent and regular seat if designed for two (2) persons, or upon another seat firmly attached to the rear or side of the operator.

History: En. Sec. 102, Ch. 263, L. 1955.

Contributory Negligence

The fact that plaintiffs were riding double in violation of this section did not prevent them from recovering under the Federal Tort Claims Act for injuries arising out of a collision with a mail truck, where the evidence did not indicate

that plaintiffs' violation was a contributing cause of the collision. *Chavez v. United States*, 192 F Supp 263.

Collateral References

Overcrowding motor vehicle or riding in unusual position thereon as affecting liability for injury or damage. 44 ALR 2d 238.

32-21-106. Obstruction to driver's view or driving mechanism. (a) No person shall drive a vehicle when it is so loaded, or when there are in the front seat such number of persons, exceeding three (3), as to obstruct the view of the driver to the front or sides of the vehicle or as to interfere with the driver's control over the driving mechanism of the vehicle.

(b) No passenger in a vehicle shall ride in such position as to interfere with the driver's view ahead or to the sides, or to interfere with his control over the driving mechanism of the vehicle.

History: En. Sec. 103, Ch. 263, L. 1955.

unusual position thereon as affecting liability for injury or damage. 44 ALR 2d 238.

Collateral References

Overcrowding motor vehicle or riding in

32-21-107. Driving on mountain highways. The driver of a motor vehicle traveling through defiles or canyons or on mountain highways shall hold such motor vehicle under control and as near the right-hand edge of the highway as reasonably possible.

History: En. Sec. 104, Ch. 263, L. 1955.

32-21-108. Coasting prohibited. The driver of any motor vehicle when traveling upon a down grade shall not coast with the gears of such vehicle in neutral or with the clutch manually disengaged.

History: En. Sec. 105, Ch. 263, L. 1955.

32-21-109. Following fire apparatus prohibited. The driver of any vehicle other than one on official business shall not follow any fire apparatus traveling in response to a fire alarm closer than five hundred (500) feet or drive into or park such vehicle within the block where fire apparatus has stopped in answer to a fire alarm.

History: En. Sec. 106, Ch. 263, L. 1955.

32-21-110. Crossing fire hose. No vehicle shall be driven over any unprotected hose of a fire department when laid down on any street, or private driveway, to be used at any fire or alarm of fire, without the consent of the fire department official in command.

History: En. Sec. 107, Ch. 263, L. 1955.

32-21-111. Putting glass, etc., on highway prohibited. (a) No person shall throw or deposit upon any highway any glass bottle, glass, nails, tacks, wire, cans, or any other substance likely to injure any person, animal, or vehicle upon such highway.

(b) Any person who drops, or permits to be dropped or thrown, upon any highway any destructive or injurious material shall immediately remove the same or cause it to be removed.

(c) Any person removing a wrecked or damaged vehicle from a highway shall remove any glass or other injurious substance dropped upon the highway from such vehicle.

History: En. Sec. 108, Ch. 263, L. 1955.

32-21-112. Riding on fenders or running boards prohibited. Any person driving a vehicle shall not permit passengers to ride on the fenders or running boards nor shall any passenger ride on the fenders or running boards of a vehicle.

History: En. Sec. 109, Ch. 263, L. 1955.

unusual position thereon as affecting liability for injury or damage. 44 ALR 2d 238.

Collateral References

Overcrowding motor vehicle or riding in

32-21-112.1. Riding in house trailers. No person or persons shall occupy a house trailer while it is being moved upon a public highway.

History: Sec. 109.1, Ch. 263, L. 1955 as added by Sec. 1, Ch. 167, L. 1957.

32-21-112.2. Opening and closing vehicles doors. No person shall open the door of a motor vehicle on the side available to moving traffic unless and until it is reasonably safe to do so, nor shall any person leave a door open on the side of a vehicle available to moving traffic for a period of time longer than necessary to load or unload passengers.

History: Sec. 109.2, Ch. 263, L. 1955 as added by Sec. 1, Ch. 167, L. 1957.

32-21-113. Shooting from or across highway. No person shall shoot any firearm from or across the roadway of any state or federal highway.

History: En. Sec. 110, Ch. 263, L. 1955.

Cross-Reference

Shooting game from automobile or highway prohibited, sec. 26-301, par. 1.

32-21-114. Scope and effect of regulations. (a) It is a misdemeanor for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person, or which does not contain those parts or is not at all times equipped with such lamps and other equipment in proper condition and adjustment as required in sections 32-21-114 to 32-21-153 or which is equipped in any manner in violation of this article, or for any person to do any act forbidden or fail to perform any act required under sections 32-21-114 to 32-21-153.

(b) Nothing contained in sections 32-21-114 to 32-21-153 shall be construed to prohibit the use of additional parts and accessories on any vehicle not inconsistent with the provisions of sections 32-21-114 to 32-21-153.

(c) The provisions of sections 32-21-114 to 32-21-153 with respect to equipment on vehicles shall not apply to implements of husbandry, road machinery, road rollers, or farm tractors except as herein made applicable.

History: En. Sec. 111, Ch. 263, L. 1955.

Compiler's Note

Sections 32-21-114 to 32-21-153 comprised Article XIV of Ch. 263, Laws 1955 entitled "Equipment."

Collateral References

Automobiles 148, 149.
60 C.J.S. Motor Vehicles § 26.
5A Am. Jur. 379, Automobiles and Highway Traffic, §§ 247-255.

Validity and construction of regulations as to lights. 11 ALR 1226.

Liability of owner of motor vehicle for accident resulting from alleged breaking of or defect in steering mechanism. 23 ALR 2d 539.

Liability of bailor of automotive vehicle for personal injury or death due to defects therein. 46 ALR 2d 404.

32-21-115. When lighted lamps are required. Every vehicle upon a highway within this state at any time from a half ($\frac{1}{2}$) hour after sunset to a half ($\frac{1}{2}$) hour before sunrise and at any other time when due to insufficient light, or unfavorable atmospheric conditions, persons and ve-

hicles on the highway are not clearly discernible at a distance of five hundred (500) feet ahead shall display lighted lamps and illuminating devices as hereinafter respectively required for different classes of vehicles, subject to exceptions with respect to parked vehicles.

History: En. Sec. 112, Ch. 263, L. 1955.

References

Win Del Ranches, Inc. v. Rolfe and Wood, Inc., — M —, 350 P 2d 581, 584.

Collateral References

Violation of regulations as to lights, as affecting right of operator or owner of automobile to recover for negligence. 14 ALR 794.

Regulations as to driving motor vehicle without lights or with improper lights as affecting liability for collision. 21 ALR 2d 7.

Construction and operation of statute as to motor vehicle lights. 67 ALR 2d 125.

Contributory negligence of driver or occupant of motor vehicle driven without lights or with defective or inadequate lights and involved in accident due to alleged condition of highway. 67 ALR 2d 151.

DECISIONS UNDER FORMER LAW

Casual Relationship to Accident

While violation of former section 32-1132, requiring headlights on automobiles between one hour after sunset and one hour before sunrise, constituted negligence, in considering whether or not such negligence contributed to an accident or barred recovery, courts must take into consideration the conditions existing at the time and place of the accident. *Simpson v. Miller*, 97 M 328, 337, 34 P 2d 528.

Unfavorable Atmospheric Conditions

In an action for damages for personal injuries sustained in a collision after dark

between plaintiff's automobile, the lights of which were burning, and that of the defendant without lights, in which the negligence alleged was defendant's driving without lights when a reasonably prudent man would have had them burning, an instruction that if the accident occurred before the hour fixed by former section 32-1132 for having lights, the absence of lights could not be deemed negligence, was properly refused, the hour fixed by statute being immaterial if the conditions were such as to require the display of lights. *Knott v. Pepper*, 74 M 236, 239 P 1037.

32-21-116. Visibility distance and mounted height of lamps. (a)

Whenever requirement is hereinafter declared as to the distance from which certain lamps and devices shall render objects visible or within which such lamps or devices shall be visible, said provisions shall apply during the times stated in section 32-21-115 in respect to a vehicle without load when upon a straight, level, unlighted highway under normal atmospheric conditions unless a different time or condition is expressly stated.

(b) Whenever requirement is hereinafter declared as to the mounted height of lamps or devices it shall mean from the center of such lamp or device to the level ground upon which the vehicle stands when such vehicle is without a load.

History: En. Sec. 113, Ch. 263, L. 1955.

32-21-117. Head lamps on motor vehicles. (a) Every motor vehicle other than a motorcycle or motor-driven cycle shall be equipped with at least two (2) head lamps with at least one (1) on each side of the front of the motor vehicle, which head lamps shall comply with the requirements and limitations set forth in sections 32-21-114 to 32-21-153.

(b) Every motorcycle and every motor-driven cycle shall be equipped with at least one (1) and not more than two (2) head lamps which shall comply with the requirements and limitations of sections 32-21-114 to 32-21-153.

(c) Every head lamp upon every motor vehicle, including every motorcycle and every motor-driven cycle, shall be located at a height measured from the center of the head lamp of not more than fifty-four (54) inches nor less than twenty-four (24) inches to be measured as set forth in section 32-21-116(b).

History: En. Sec. 114, Ch. 263, L. 1955;
amd. Sec. 1, Ch. 103, L. 1957.

32-21-118. Tail lamps. (a) Every motor vehicle, trailer, semitrailer, and pole trailer and any other vehicle which is being drawn at the end of a train of vehicles, shall be equipped with at least one (1) tail lamp mounted on the rear, which, when lighted as hereinbefore required, shall emit a red light plainly visible from a distance of five hundred (500) feet to the rear, provided that in the case of a train of vehicles only the tail lamp on the rearmost vehicle need actually be seen from the distance specified. And further, every such above-mentioned vehicle, other than a truck-tractor, registered in this state and manufactured or assembled after January 1, 1956, shall be equipped with at least two (2) tail lamps mounted on the rear, which when lighted as herein required, shall comply with the provisions of this section.

(b) Every tail lamp upon every vehicle shall be located at a height of not more than seventy-two (72) inches nor less than twenty (20) inches.

(c) Either tail lamp or a separate lamp shall be so constructed and placed as to illuminate with a white light the rear registration plate and render it clearly legible from a distance of fifty (50) feet to the rear. Any tail lamp or tail lamps, together with any separate lamp for illuminating the rear registration plate, shall be so wired as to be lighted whenever the head lamps or auxiliary driving lamps are lighted.

History: En. Sec. 115, Ch. 263, L. 1955.

32-21-119. New motor vehicles to be equipped with reflectors. (a) Every new motor vehicle hereafter sold and operated upon a highway, other than a truck-tractor, shall carry on the rear, either as a part of the tail lamps or separately, two (2) red reflectors, except that every motorcycle and motor-driven cycle shall carry at least one (1) reflector, meeting the requirements of this section, and except that vehicles of the type mentioned in section 32-21-122 shall be equipped with reflectors as required in those sections applicable thereto.

(b) Every such reflector shall be mounted on the vehicle at a height not less than twenty (20) inches nor more than sixty (60) inches measured as set forth in section 32-21-116(b), and shall be of such size and characteristics and so mounted as to be visible at night from all distances within three hundred (300) feet to fifty (50) feet from such vehicle when directly in front of lawful upper beams of head lamps, except that visibility from a greater distance is hereinafter required of reflectors on certain types of vehicles.

History: En. Sec. 116, Ch. 263, L. 1955.

32-21-120. Stop lamps and turn signals required on new motor vehicles. From and after January 1, 1956, it shall be unlawful for any person to sell any new motor vehicle, including any motorcycle or motor-driven cycle, in this state or for any person to drive such vehicle on the highways unless it is equipped with at least one (1) stop lamp meeting the requirements of section 32-21-133.

History: En. Sec. 117, Ch. 263, L. 1955.

32-21-121. Application of succeeding sections. Those sections of this act which follow immediately including sections 32-21-122, 32-21-123, 32-21-124, 32-21-125, and 32-21-127 relating to clearance and marker lamps, reflectors, and stop lights, shall apply as stated in said sections to vehicles of the type therein enumerated, namely passenger buses, trucks, truck tractors, and certain trailers, semitrailers, and pole trailers, respectively, when operated upon any highway, and said vehicles shall be equipped as required and all lamp equipment required shall be lighted at all times mentioned in section 32-21-115 except that clearance and side marker lamps need not be lighted on any said vehicle when operated within any municipality where there is sufficient light to render clearly discernible persons and vehicles on the highway at a distance of five hundred (500) feet.

History: En. Sec. 118, Ch. 263, L. 1955.

32-21-122. Additional equipment required on certain vehicles. In addition to other equipment required in this act the following vehicles shall be equipped as herein stated under the conditions stated in section 32-21-121.

(a) On every bus or truck, whatever its size, there shall be the following:

On the rear, two (2) reflectors, one (1) at each side, and one (1) stop light.

(b) On every bus or truck eighty (80) inches or more in over-all width, in addition to the requirements in paragraph (a):

On the front, two (2) clearance lamps, one (1) at each side.

On the rear, two (2) clearance lamps, one (1) at each side.

On each side, two (2) side marker lamps, one (1) at or near the front and one (1) at or near the rear.

On each side, two (2) reflectors, one (1) at or near the front and one (1) at or near the rear.

(c) On every truck-tractor:

On the front, two (2) clearance lamps, one (1) at each side.

On the rear, one (1) stop light.

(d) On every trailer or semitrailer having a gross weight in excess of three thousand (3,000) pounds:

On the front, two (2) clearance lamps, one (1) at each side.

On each side, two (2) side marker lamps, one (1) at or near the front and one (1) at or near the rear.

On each side, two (2) reflectors, one (1) at or near the front and one (1) at or near the rear.

On the rear, two (2) clearance lamps, one (1) at each side, also two (2) reflectors, one (1) at each side, and one (1) stop light.

(e) On every pole trailer in excess of three thousand (3,000) pounds gross weight:

On each side, one (1) side marker lamp and one (1) clearance lamp which may be in combination, to show to the front, side, and rear.

On the rear of the pole trailer or load, two (2) reflectors, one (1) at each side.

(f) On every trailer, semitrailer, or pole trailer weighing three thousand (3,000) pounds gross or less:

On the rear, two (2) reflectors, one (1) on each side. If any trailer or semitrailer is so loaded or is of such dimensions as to obscure the stop light on the towing vehicle, then such vehicle shall also be equipped with one (1) stop light.

(g) On every truck or truck-trailer combination actively engaged in transporting logs:

(1) Binders on Logging Vehicles

(a) At least three (3) binders shall be required as standard equipment on any truck or truck-trailer combination actively engaged in transporting logs upon the public highways of the state of Montana;

(b) Such binders to be of steel chain or steel cable;

(c) The minimum diameter of any portion of such binders shall be three-eighths ($\frac{3}{8}$) of one inch;

(d) Such binders shall be of sufficient length to encompass any load when secured by a fastener.

(2) Use of Fasteners to Secure Binders

(a) Binders used to secure loads of logs together shall be fastened by means of a fastener.

(b) The minimum diameter of the portions of the fastener under direct stress from the binder shall be three-eighths ($\frac{3}{8}$) of one inch.

(c) The handle, or leverage portion of the fastener, when in use in tightening and holding the binder, shall be securely fastened to the binder or to the fastener in such a way that it cannot be accidentally loosened.

(3) Number and Location of Binders

At least two (2) binders shall be in use on all loads. Such binders shall be placed as close as reasonably possible to the front and rear bunks.

(4) Securing Short Loads

In the event short logs are loaded on top of longer logs, sufficient binders shall be used to secure both ends of such short logs to the main body of the load.

(5) Procedure for Loading—Width Limits

(a) The maximum width of any vehicle, unladen or with load, shall not exceed a width of ninety-six (96) inches, unless permits for excess width have been granted by virtue of section 32-1127.

(b) No logs may extend laterally beyond the stakes which form the outer boundary of the load at the top of such stakes. Logs or poles

loaded above the tops of the stakes shall be loaded in a pyramidal fashion.

(h) The board is hereby empowered to make additional rules and regulations governing the use of safety equipment on motor vehicles, vehicles and/or combination of vehicles, that is, trailer hitches, safety chains, mounts, tow bars and other similar equipment as it shall deem advisable for the protection of the public; provided further that any violation of any rules and regulations adopted by the board shall be deemed a misdemeanor.

History: En. Sec. 119, Ch. 263, L. 1955;
amd. Sec. 1, Ch. 233, L. 1959.

Collateral References
Automobiles \Rightarrow 149.
60 C.J.S. Motor Vehicles § 263.

32-21-123. Color of clearance lamps, side marker lamps, reflectors and back-up lamps. (a) Front clearance lamps and those marker lamps and reflectors mounted on the front or on the side near the front of a vehicle shall display or reflect an amber color.

(b) Rear clearance lamps and those marker lamps and reflectors mounted on the rear or on the sides near the rear of a vehicle shall display or reflect a red color.

(c) All lighting devices and reflectors mounted on the rear of any vehicle shall display or reflect a red color, except the stop light or other signal device, which may be red, amber, or yellow, and except that the light illuminating the license plate shall be white and the light emitted by a back-up lamp may be white, amber, or red.

History: En. Sec. 120, Ch. 263, L. 1955.

32-21-124. Mounting of reflectors, clearance lamps, and side marker lamps. (a) Reflectors when required by section 32-21-122 shall be mounted at a height not less than twenty-four (24) inches and not higher than sixty (60) inches above the ground on which the vehicle stands, except that if the highest part of the permanent structure of the vehicle is less than twenty-four (24) inches the reflector at such point shall be mounted as high as that part of the permanent structure will permit.

The rear reflectors on a pole trailer may be mounted on each side of the bolster or load.

Any required red reflector on the rear of a vehicle may be incorporated with the tail lamp, but such reflector shall meet all the other reflector requirements of this act.

(b) Clearance lamps shall be mounted on the permanent structure of the vehicle in such a manner as to indicate its extreme width and as near the top thereof as practicable. Clearance lamps and side marker lamps may be mounted in combination provided illumination is given as required herein with reference to both.

History: En. Sec. 121, Ch. 263, L. 1955.

32-21-125. Visibility of reflectors, clearance lamps, and marker lamps. (a) Every reflector upon any vehicle referred to in section 32-21-122

shall be of such size and characteristics and so maintained as to be readily visible at nighttime from all distances within six hundred (600) feet to one hundred (100) feet from the vehicle when directly in front of lawful upper beams of head lamps. Reflectors required to be mounted on the sides of the vehicle shall reflect the required color of light to the sides, and those mounted on the rear shall reflect a red color to the rear.

(b) Front and rear clearance lamps shall be capable of being seen and distinguished under normal atmospheric conditions at the times lights are required at a distance of five hundred (500) feet from the front and rear respectively, of the vehicle.

(c) Side marker lamps shall be capable of being seen and distinguished under normal atmospheric conditions at the times lights are required at a distance of five hundred (500) feet from the side of the vehicle on which mounted.

History: En. Sec. 122, Ch. 263, L. 1955.

32-21-126. Obstructed lights not required. Whenever motor and other vehicles are operated in combination during the time that lights are required, any lamp (except tail lamps) need not be lighted which, by reason of its location on a vehicle of the combination, would be obscured by another vehicle of the combination, but this shall not affect the requirements that lighted clearance lamps be displayed on the front of the foremost vehicle required to have clearance lamps nor that all lights required on the rear of the rearmost vehicle of any combination shall be lighted.

History: En. Sec. 123, Ch. 263, L. 1955.

32-21-127. Lamp or flag on projecting load. Whenever the load upon any vehicle extends to the rear four (4) feet or more beyond the bed or body of such vehicle there shall be displayed at the extreme rear end of the load, at the times specified in section 32-21-115, a red light or lantern plainly visible from a distance of at least five hundred (500) feet to the sides and rear. The red light or lantern required under this section shall be in addition to the red light required upon every vehicle. At any other time there shall be displayed at the extreme rear end of such load a red flag or cloth not less than twelve (12) inches square and so hung that the entire area is visible to the driver of a vehicle approaching from the rear.

History: En. Sec. 124, Ch. 263, L. 1955.

32-21-128. Lamps on parked vehicles. (a) Whenever a vehicle is lawfully parked upon a street or highway during the hours between a half ($\frac{1}{2}$) hour after sunset and a half ($\frac{1}{2}$) hour before sunrise and in the event there is sufficient light to reveal any person or object within a distance of five hundred (500) feet upon such street or highway no lights need be displayed upon such parked vehicle.

(b) Whenever a vehicle is parked or stopped upon a roadway or shoulder adjacent thereto, whether attended or unattended, during the hours between a half ($\frac{1}{2}$) hour after sunset and a half ($\frac{1}{2}$) hour before sunrise and there is not sufficient light to reveal any person or object within a distance of five hundred (500) feet upon such highway, such

vehicle so parked or stopped shall be equipped with one (1) or more lamps meeting the following requirements: At least one (1) lamp shall display a white or amber light visible from a distance of five hundred (500) feet to the front of the vehicle, and the same lamp or at least one (1) other lamp shall display a red light visible from a distance of five hundred (500) feet to the rear of the vehicle, and the location of said lamp or lamps, shall always be such that at least one (1) lamp or combination of lamps meeting the requirements of this section is installed as near as practicable to the side of the vehicle which is closest to passing traffic. The foregoing provisions shall not apply to a motor-driven cycle.

(c) Any lighted head lamp upon a parked vehicle shall be depressed or dimmed.

History: En. Sec. 125, Ch. 263, L. 1955.

Construction of statute as to parking or stopping of motor vehicle on highway without lights. 67 ALR 2d 95.

Collateral References

Regulations as to lights on parked or standing motor vehicle as affecting liability for collision. 21 ALR 2d 95.

DECISIONS UNDER FORMER LAW

Violation as Negligence

A violation of former section 32-1132 constituted negligence, and a traveler on the highway was entitled to assume that a truck standing upon the highway at

night would display lights both upon the front and rear thereof. *Ashley v. Safeway Stores, Inc.*, 100 M 312, 326, 47 P 2d 53.

32-21-129. Lamps on farm tractors, farm equipment, and implements of husbandry. (a) Every farm tractor and every self-propelled farm equipment unit or implement of husbandry not equipped with an electric lighting system shall at all times mentioned in section 32-21-115 be equipped with at least one (1) lamp displaying a white light visible from a distance of not less than five hundred (500) feet to the front of such vehicle and shall also be equipped with at least one (1) lamp displaying a red light visible from a distance of not less than five hundred (500) feet to the rear of such vehicle and two (2) red reflectors visible from a distance of one hundred (100) to six hundred (600) feet to the rear when illuminated by the upper beams of head lamps. The lights required herein shall be positioned so that one (1) lamp showing to the front and one (1) lamp or reflector showing to the rear will indicate the furthest projection of said tractor, unit or implement on the side of the road used in passing such vehicle.

(b) Every combination of farm tractor and towed unit of farm equipment or implement of husbandry not equipped with an electric lighting system shall at all times mentioned in section 32-21-115 be equipped with the following lamps:

(1) At least one (1) lamp mounted to indicate as nearly as practicable the extreme left projection of said combination and displaying a white light visible from a distance of not less than five hundred (500) feet to the front of said combination, and

(2) Two (2) lamps each displaying a red light visible from a distance of not less than five hundred (500) feet to the rear of said combination,

or as an alternative, at least one (1) lamp displaying a red light visible from a distance of not less than five hundred (500) feet to the rear thereof and two (2) red reflectors visible from a distance of one hundred (100) to six hundred (600) feet to the rear thereof when illuminated by the upper beams of head lamps, which said lamps or reflectors shall be mounted in such manner as to indicate as nearly as practicable the extreme left and right rear projections of said towed unit or implement on the highway.

(c) Every farm tractor and every self-propelled unit of farm equipment or implement of husbandry equipped with an electric lighting system shall at all times mentioned in section 32-21-115 be equipped with two (2) single-beam or multiple-beam head lamps meeting the requirements of sections 32-21-135 or 32-21-137 respectively, or as an alternative, section 32-21-139, and two (2) red lamps visible from a distance of not less than five hundred (500) feet to the rear, or in the alternative, one (1) red lamp visible from a distance of not less than five hundred (500) feet to the rear and two (2) red reflectors visible from a distance of one hundred (100) to six hundred (600) feet to the rear when illuminated by the upper beams of head lamps; and such red lamps or reflectors shall be mounted in the rear of said farm tractor or self-propelled implement of husbandry so as to indicate as nearly as practicable the extreme left and right projections of said vehicle on the highway.

(d) Every combination of farm tractor and towed farm equipment or towed implement of husbandry equipped with an electric lighting system shall at all times mentioned in section 32-21-115 be equipped with the following lamps:

(1) The farm tractor element of every such combination shall be equipped with two (2) single-beam or multiple-beam head lamps meeting the requirements of sections 32-21-135, 32-21-137, or 32-21-139, and

(2) The towed unit of farm equipment or implement of husbandry element of such combination shall be equipped with two (2) red lamps visible from a distance of not less than five hundred (500) feet to the rear, or as an alternative, one (1) red lamp visible from a distance of not less than five hundred (500) feet to the rear and two (2) red reflectors visible from a distance of one hundred (100) to six hundred (600) feet to the rear when illuminated by the upper beams of head lamps; and such red lamps or reflectors shall be located so as to indicate as nearly as practicable the extreme left and right projections of said towed unit or implement on the highway, and

(3) Said combination shall also be equipped with a lamp displaying a white or amber light, or any shade of color between white and amber, visible from a distance of not less than five hundred (500) feet to the front and a lamp displaying a red light visible from a distance of not less than five hundred (500) feet to the rear, which said lamp or lamps shall be installed or capable of being positioned so as to indicate to the front and rear the furthest projection of said combination on the side of the road used by other vehicles in passing such combination.

History: En. Sec. 126, Ch. 263, L. 1955.

32-21-130. Lamps on other vehicles and equipment. Every vehicle, including animal-drawn vehicles and vehicles referred to in section 32-21-114(c), not specifically required by the provisions of sections 32-21-114 to 32-21-153 to be equipped with lamps or other lighting devices, shall at all times specified in section 32-21-115 be equipped with at least one (1) lamp displaying a white light visible from a distance of not less than five hundred (500) feet to the front of said vehicle, and shall also be equipped with two (2) lamps displaying red light visible from a distance of not less than five hundred (500) feet to the rear of said vehicle, or as an alternative, one (1) lamp displaying a red light visible from a distance of not less than five hundred (500) feet to the rear and two (2) red reflectors visible for distances of one hundred (100) to six hundred (600) feet to the rear when illuminated by the upper beams of head lamps.

History: En. Sec. 127, Ch. 263, L. 1955.

32-21-131. Spot lamps and auxiliary lamps. (a) Spot Lamps. Any motor vehicle may be equipped with not to exceed two (2) spot lamps and every lighted spot lamp shall be turned off upon approaching another moving vehicle from either direction.

(b) Fog Lamps. Any motor vehicle may be equipped with not to exceed two (2) fog lamps mounted on the front at a height not less than twelve (12) inches nor more than thirty (30) inches above the level surface upon which the vehicle stands and so aimed that when the vehicle is not loaded none of the high-intensity portion of the light to the left of the center of the vehicle shall at a distance of twenty-five (25) feet ahead project higher than a level of four (4) inches below the level of the center of the lamp from which it comes. Lighted fog lamps meeting the above requirements may be used with lower head-lamp beams as specified in section 32-21-135(b).

(c) Auxiliary Passing Lamps. Any motor vehicle may be equipped with not to exceed two (2) auxiliary passing lamps mounted on the front at a height not less than twenty-four (24) inches nor more than forty-two (42) inches above the level surface upon which the vehicle stands. The provisions of section 32-21-135 shall apply to any combination of head lamps and auxiliary passing lamps.

(d) Auxiliary Driving Lamps. Any motor vehicle may be equipped with not to exceed two (2) auxiliary driving lamps mounted on the front at a height not less than sixteen (16) inches nor more than forty-two (42) inches above the level surface upon which the vehicle stands. The provisions of section 32-21-135 shall apply to any combination of head lamps and auxiliary driving lamps.

History: En. Sec. 128, Ch. 263, L. 1955;
amd. Sec. 1, Ch. 147, L. 1957.

32-21-132. Audible and visual signals on vehicles. (a) Every authorized emergency vehicle shall, in addition to any other equipment and distinctive markings required by this act, be equipped with a siren, exhaust whistle or bell capable of giving an audible signal.

(b) Every bus used for the transportation of school children and every authorized emergency vehicle shall, in addition to any other equipment and distinctive markings required by this act, be equipped with signal lamps mounted as high and as widely spaced laterally as practicable, which shall be capable of displaying to the front two (2) alternately flashing red lights located at the same level and to the rear two (2) alternately flashing red lights located at the same level, and these lights shall have sufficient intensity to be visible at five hundred (500) feet in normal sunlight.

(c) A police vehicle when used as an authorized emergency vehicle may but need not be equipped with alternately flashing red lights specified herein. The use of the signal equipment described herein shall impose upon drivers of other vehicles the obligation to yield right of way and stop as prescribed in sections 32-2175 and 32-2197.

History: En. Sec. 129, Ch. 263, L. 1955;
amd. Sec. 1, Ch. 40, L. 1959.

32-21-133. Signal lamps and signal devices. (a) Any motor vehicle may be equipped and when required under this act shall be equipped with a stop lamp or lamps on the rear of the vehicle which shall display a red or amber light, or any shade of color between red and amber, visible from a distance of not less than one hundred (100) feet to the rear in normal sunlight, and which shall be actuated upon application of the service (foot) brake, and which may but need not be incorporated with one (1) or more other rear lamps.

(b) Any motor vehicle may be equipped and when required under this act shall be equipped with lamps showing to the front and rear for the purpose of indicating an intention to turn either to the right or left. When lamps are used for such purposes, the lamps showing to the front shall be located on the same level and as widely spaced laterally as practicable and when in use shall display a white or amber light, or any shade of color between white and amber, visible from a distance of not less than one hundred (100) feet to the front in normal sunlight, and the lamps showing to the rear shall be located at the same level and as widely spaced laterally as practicable and when in use shall display a red or amber light, or any shade of color between red and amber, visible from a distance of not less than one hundred (100) feet to the rear in normal sunlight. When actuated such lamps shall indicate the intended direction of turning by flashing the lights showing to the front and rear on the side toward which the turn is made.

(c) No stop lamp or signal lamp or device shall project a glaring light.

History: En. Sec. 130, Ch. 263, L. 1955;
amd. Sec. 2, Ch. 105, L. 1957.

32-21-134. Additional lighting equipment. (a) Any motor vehicle may be equipped with not more than two (2) side cowl or fender lamps which shall emit an amber or white light without glare.

(b) Any motor vehicle may be equipped with not more than one (1) running board courtesy lamp on each side thereof which shall emit a white or amber light without glare.

(c) Any motor vehicle may be equipped with not more than two (2) back-up lamps either separately or in combination with other lamps, but any such back-up lamps shall not be lighted when the motor vehicle is in forward motion.

(d) Any vehicle may be equipped with lamps which may be used for the purpose of warning the operators of other vehicles of the presence of a vehicular traffic hazard requiring the exercise of unusual care in approaching, overtaking, or passing, and when so equipped may display such warning in addition to any other warning signals required by this act. The lamps used to display such warning to the front shall be mounted at the same level and as widely spaced laterally as practicable and shall display simultaneously flashing white or amber lights, or any shade of color between white and amber. The lamps used to display such warning to the rear shall be mounted at the same level and as widely spaced laterally as practicable, and shall show simultaneously flashing amber or red lights, or any shade of color between amber and red. These warning lights shall be visible from a distance of not less than five hundred (500) feet under normal atmospheric conditions at night.

History: En. Sec. 131, Ch. 263, L. 1955.

32-21-135. Multiple-beam road-lighting equipment. Except as herein-after provided, the head lamps or the auxiliary driving lamp or the auxiliary passing lamp or combination thereof on motor vehicles other than motorcycles or motor-driven cycles shall be so arranged that the driver may select at will between distributions of light projected to different elevations and such lamps may, in addition, be so arranged that such selection can be made automatically, subject to the following limitations:

(a) There shall be an uppermost distribution of light, or composite beam, so aimed and of such intensity as to reveal persons and vehicles at a distance of at least three hundred fifty (350) feet ahead for all conditions of loading.

(b) There shall be a lowermost distribution of light, or composite beam, so aimed and of sufficient intensity to reveal persons and vehicles at a distance of at least one hundred (100) feet ahead; and on a straight level road under any condition of loading none of the high-intensity portion of the beam shall be directed to strike the eyes of an approaching driver.

(c) Every new motor vehicle, other than a motorcycle, or motor-driven cycle, registered in this state after January 1, 1956, which has multiple-beam road-lighting equipment shall be equipped with a beam indicator, which shall be lighted whenever the uppermost distribution of light from the head lamps is in use, and shall not otherwise be lighted. Said indicator shall be so designed and located that when lighted it will be readily visible without glare to the driver of the vehicle so equipped.

History: En. Sec. 132, Ch. 263, L. 1955.

32-21-136. Use of multiple-beam road-lighting equipment. (a) Whenever a motor vehicle is being operated on a roadway or shoulder adjacent thereto during the times specified in section 32-21-115, the driver shall use a distribution of light, or composite beam, directed high enough and of sufficient intensity to reveal persons and vehicles at a safe distance in advance of the vehicle subject to the following requirements and limitations:

(b) Whenever the driver of a vehicle approaches an oncoming vehicle within one thousand (1,000) feet, such driver shall use a distribution of light or composite beam so aimed that the glaring rays are not projected into the eyes of the oncoming driver.

The lowermost distribution of light specified in Item 1 of section 32-21-135(b) shall be deemed to avoid glare at all times, regardless of road contour and loading.

(c) Whenever the driver of a vehicle follows another vehicle within three hundred (300) feet to the rear, such driver shall use a distribution of light permissible under this act other than the uppermost distribution of light specified in paragraph (a) of section 32-21-135.

History: En. Sec. 133, Ch. 263, L. 1955.

tions as to dimming motor vehicle lights.
22 ALR 2d 427.

Collateral References

Construction and operation of regula-

32-21-137. Single-beam road-lighting equipment. Head lamps arranged to provide a single distribution of light shall be permitted on motor vehicles manufactured and sold prior to one (1) year after the effective date of this act in lieu of multiple-beam road-lighting equipment herein specified if the single distribution of light complies with the following requirements and limitations:

1. The head lamps shall be so aimed that when the vehicle is not loaded none of the high-intensity portion of the light shall at a distance of twenty-five (25) feet ahead project higher than a level of five (5) inches below the level of the center of the lamp from which it comes, and in no case higher than forty-two (42) inches above the level on which the vehicle stands at a distance of seventy-five (75) feet ahead.

2. The intensity shall be sufficient to reveal persons and vehicles at a distance of at least two hundred (200) feet.

History: En. Sec. 134, Ch. 263, L. 1955.

32-21-138. Lighting equipment on motor-driven cycles. The head lamp or head lamps upon every motor-driven cycle may be of the single-beam or multiple-beam type but in either event shall comply with the requirements and limitations as follows:

1. Every said head lamp or head lamps on a motor-driven cycle shall be of sufficient intensity to reveal a person or a vehicle at a distance of not less than one hundred (100) feet when the motor-driven cycle is operated at any speed less than twenty-five (25) miles per hour and at a distance of not less than two hundred (200) feet when the motor-driven cycle is operated at a speed of twenty-five (25) or more miles per hour, and at a distance of not less than three hundred (300) feet when the motor-

driven cycle is operated at a speed of thirty-five (35) or more miles per hour.

2. In the event the motor-driven cycle is equipped with a multiple-beam head lamp or head lamps the upper beam shall meet the minimum requirements set forth above and shall not exceed the limitations set forth in section 32-21-135(a) and the lowermost beam shall meet the requirements applicable to a lowermost distribution of light as set forth in section 32-21-135(b).

3. In the event the motor-driven cycle is equipped with a single-beam lamp or lamps, said lamp or lamps shall be so aimed that when the vehicle is loaded none of the high-intensity portion of light at a distance of twenty-five (25) feet ahead, shall project higher than the level of the center of the lamp from which it comes.

History: En. Sec. 135, Ch. 263, L. 1955.

32-21-139. Alternate road-lighting equipment. Any motor vehicle may be operated under the conditions specified in section 32-21-115 when equipped with two (2) lighted lamps upon the front thereof capable of revealing persons and objects seventy-five (75) feet ahead in lieu of lamps required in section 32-21-135 or section 32-21-137 provided, however, that at no time shall it be operated at a speed in excess of twenty (20) miles per hour.

History: En. Sec. 136, Ch. 263, L. 1955.

32-21-140. Number of driving lamps required or permitted. (a) At all times specified in section 32-21-115, at least two (2) lighted lamps shall be displayed one (1) on each side at the front of every motor vehicle other than a motorcycle or motor-driven cycle, except when such vehicle is parked subject to the regulations governing lights on parked vehicles.

(b) Whenever a motor vehicle equipped with head lamps as herein required is also equipped with any auxiliary lamps or a spot lamp or any other lamp on the front thereof projecting a beam of intensity greater than three hundred (300) candlepower, not more than a total of four (4) of any such lamps on the front of a vehicle shall be lighted at any one time when upon a highway.

History: En. Sec. 137, Ch. 263, L. 1955.

32-21-141. Special restrictions on lamps. (a) Any lighted lamp or illuminating device upon a motor vehicle other than head lamps, spot lamps, auxiliary lamps, or flashing turn signals, emergency vehicle warning lamps, and school bus warning lamps, which projects a beam of light of an intensity greater than three hundred (300) candlepower shall be so directed that no part of the high intensity portion of the beam will strike the level of the roadway on which the vehicle stands at a distance of more than seventy-five (75) feet from the vehicle.

(b) No person shall drive or move any vehicle or equipment upon a highway with any lamp or device thereon displaying a red light visible from directly in front of the center thereof. This section shall not apply

to any vehicle upon which a red light visible from the front is expressly authorized or required by this code.

(c) Flashing lights are prohibited except on an authorized emergency vehicle, school bus, snow-removal equipment, or on any vehicle as a means for indicating a right or left turn, or the presence of a vehicular traffic hazard requiring unusual care in approaching, overtaking, or passing.

History: En. Sec. 138, Ch. 263, L. 1955.

32-21-141.1. Blinker-type red light on fireman's private vehicle—use—identification card. Firemen, when authorized by the chief of their respective department, shall be permitted to use a blinker-type red light on the front of their privately owned motor vehicles with the word "FIRE" inscribed on the lens, which lens shall not exceed five and one-half inches in diameter. This light shall be used on emergency duty only.

Any fireman displaying the emergency red light on his privately owned motor vehicle, shall also carry attached to a convenient location on the vehicle to which the red light is attached, an identification card showing the name of the owner of said vehicle, the organization to which he belongs, and bearing the signature of the chief of his department, authorizing the emergency use of said light.

History: En. Sec. 1, Ch. 154, L. 1957.

32-21-141.2. Violation—misdemeanor. Any person violating the provisions of sections 32-21-141.1 and 32-21-141.2 is guilty of a misdemeanor.

History: En. Sec. 2, Ch. 154, L. 1957.

32-21-142. Standards for lights on snow-removal equipment. (a) The commission shall adopt standards and specifications applicable to head lamps, clearance lamps, identification and other lamps on snow-removal equipment when operated on the highways of this state in lieu of the lamps otherwise required on motor vehicles by this act. Such standards and specifications may permit the use of flashing lights for purposes of identification on snow-removal equipment when in service upon the highways. The standards and specifications for lamps referred to in this section shall correlate with, and so far as possible, conform with those approved by the American association of state highway officials.

(b) It shall be unlawful to operate any snow-removal equipment on any highway unless the lamps thereon comply with and are lighted when and as required by the standards and specifications adopted as provided in this section.

History: En. Sec. 139, Ch. 263, L. 1955.

32-21-143. Brakes. (a) Brake Equipment Required.

1. Every motor vehicle, other than a motorcycle or motor-driven cycle, when operated upon a highway shall be equipped with brakes adequate to control the movement of and to stop and hold such vehicle, including two (2) separate means of applying the brakes, each of which means shall be effective to apply the brakes to at least two (2) wheels. If these two (2) separate means of applying the brakes are connected in any way, they

shall be so constructed that failure of any one (1) part of the operating mechanism shall not leave the motor vehicle without brakes on at least two (2) wheels.

2. Every motorcycle and every motor-driven cycle, when operated upon a highway, shall be equipped with at least one (1) brake which may be operated by hand or foot.

3. Every trailer or semitrailer of a gross weight of three thousand (3,000) pounds or more when operated upon a highway shall be equipped with brakes adequate to control the movement of and to stop and to hold such vehicle and so designed as to be applied by the driver of the towing motor vehicle from its cab, and said brakes shall be so designed and connected that in case of an accidental break-away of the towed vehicle the brakes shall be automatically applied.

4. Every new motor vehicle, trailer, or semitrailer hereafter sold in this state and operated upon the highways shall be equipped with service brakes upon all wheels of every such vehicle, except that any vehicle having three (3) or more axles shall have brakes on the wheels of at least two (2) axles, and except any motorcycle or motor-driven cycle, or any semitrailer of less than one thousand five hundred (1,500) pounds gross weight need not be equipped with brakes.

5. One of the means of brake operation shall consist of a mechanical connection from the operating lever to the brake shoes or bands and this brake shall be capable of holding the vehicle, or combination of vehicles, stationary under any condition of loading on any upgrade or down grade upon which it is operated.

6. The brake shoes operating within or upon the drums on the vehicle wheels of any motor vehicle may be used for both service and hand operation.

(b) Performance Ability of Brakes. Every motor vehicle or combination of vehicles at all times and under all conditions of loading shall, upon application of the service (foot) brake, be capable of decelerating and developing a braking force equivalent to such deceleration according to the minimum requirements set forth herein, and also of stopping within the distances set forth herein:

	Stopping distance in feet	Deceleration in feet per second per second	Equivalent braking force in percentage of vehicle or combination weight
Passenger vehicles not including buses.....	25	17	53.0%
Single-unit vehicles with a manufacturer's gross vehicle weight rating of less than 10,000 pounds	30	14	43.5%
Single-unit, 2-axle vehicles with a manu- facturer's gross vehicle weight rating of 10,000 pounds or more	40	14	43.5%
All other vehicles and combinations with a manufacturer's gross vehicle weight rating of 10,000 or more pounds	50	14	43.5%

Compliance with standards set forth herein shall be determined either (1) by actual road tests conducted on a substantially level (not to exceed a plus or minus one per cent (1%) grade), dry, smooth, hard-surfaced road that is free from loose material, and with stopping distances measured from the actual instant braking controls are moved and from an initial speed of twenty (20) miles per hour, or else (2) by suitable mechanical tests in a testing lane which recreates such same conditions, or (3) by a combination of both methods.

Stopping distance shall be measured from the instant braking controls are moved and from an initial speed of twenty (20) miles per hour.

History: En. Sec. 140, Ch. 263, L. 1955;
amd. Sec. 1, Ch. 81, L. 1957.

32-21-144. Brakes on motor-driven cycles. (a) The board is authorized to require an inspection of the brake on any motor-driven cycle and to disapprove any such brake which they find will not comply with the performance ability standard set forth in section 32-21-143 or which in their opinion is not so designed or constructed as to insure reasonable and reliable performance in actual use.

(b) The registrar may refuse to register or may suspend or revoke the registration of any vehicle referred to in this section when it has been determined that the brakes thereon do not comply with the provisions of this section.

(c) No person shall operate on any highway any vehicle referred to in this section in the event the board has disapproved the brake equipment upon such vehicle or type of vehicle.

History: En. Sec. 141, Ch. 263, L. 1955.

32-21-145. Horns and warning devices. (a) Every motor vehicle when operated upon a highway shall be equipped with a horn in good working order and capable of emitting sound audible under normal conditions from a distance of not less than two hundred (200) feet, but no horn or other warning device shall emit an unreasonably loud or harsh sound or a whistle. The driver of a motor vehicle shall when reasonably necessary to insure safe operation give audible warning with his horn but shall not otherwise use such horn when upon a highway.

(b) No vehicle shall be equipped with nor shall any person use upon a vehicle any siren, whistle, or bell, except as otherwise permitted in this section.

(c) It is permissible but not required that any commercial vehicle be equipped with a theft alarm signal device which is so arranged that it cannot be used by the driver as an ordinary warning signal.

(d) Any authorized emergency vehicle may be equipped with a siren, whistle, or bell, capable of emitting sound audible under normal conditions from a distance of not less than five hundred (500) feet and of a type approved by the board, but such siren shall not be used except when such vehicle is operated in response to an emergency call or in the immediate pursuit of an actual or suspected violator of the law, in which said latter

events the driver of such vehicle shall sound said siren when reasonably necessary to warn pedestrians and other drivers of the approach thereof.

History: En. Sec. 142, Ch. 263, L. 1955.

32-21-146. Mufflers, prevention of noise. (a) Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke, and no person shall use a muffler cut-out, by-pass, or similar device upon a motor vehicle on a highway.

(b) The engine and power mechanism of every motor vehicle shall be so equipped and adjusted as to prevent the escape of excessive fumes or smoke.

History: En. Sec. 143, Ch. 263, L. 1955.

mufflers or similar noise-preventing devices on motor vehicles. 49 ALR 2d 1202.

Collateral References

Validity of public regulation requiring

32-21-147. Mirrors. On and after January 1, 1960, every motor vehicle, shall be equipped with a mirror so located as to reflect to the driver a view of the highway for a distance of at least two hundred (200) feet to the rear of such motor vehicle.

History: En. Sec. 144, Ch. 263, L. 1955; amd. Sec. 1, Ch. 113, L. 1959.

Collateral References

Operation of regulations requiring motor vehicles to be equipped with adequate mirrors. 27 ALR 2d 1040.

32-21-148. Windshields must be unobstructed and equipped with wipers.

(a) No person shall drive any motor vehicle with any sign, poster, or other nontransparent material upon the front windshield, side wings, or side or rear windows of such vehicle which obstructs the driver's clear view of the highway or any intersecting highway.

(b) The windshield on every motor vehicle shall be equipped with a device for clearing rain, snow, or other moisture from the windshield, which device shall be so constructed as to be controlled or operated by the driver of the vehicle.

(c) Every windshield wiper upon a motor vehicle shall be maintained in good working order.

History: En. Sec. 145, Ch. 263, L. 1955.

dust, atmospheric condition, or unclean windshield. 42 ALR 2d 13.

Collateral References

Contributory negligence of driver of car striking object or obstruction in road where his vision is obscured by smoke,

Liability for motor vehicle accident where vision of driver is obscured by unclean windshield. 42 ALR 2d 336.

32-21-149. Restrictions as to tire equipment. (a) Every solid rubber tire on a vehicle shall have rubber on its entire traction surface at least one (1) inch thick above the edge of the flange of the entire periphery.

(b) No person shall operate or move on any highway any motor vehicle, trailer, or semitrailer having any metal tire in contact with roadway.

(c) No tire on a vehicle moved on a highway shall have on its periphery any block, stud, flange, cleat, or spike or any other protuberance

of any material other than rubber which projects beyond the tread of the traction surface of the tire, except that it shall be permissible to use farm machinery with tires having protuberances which will not injure the highway, and except also that it shall be permissible to use tire chains of reasonable proportions upon any vehicle when required for safety because of snow, ice, or other conditions tending to cause a vehicle to skid.

(d) The commission and local authorities in their respective jurisdictions may in their discretion issue special permits authorizing the operation upon a highway of traction engines or tractors having movable tracks with transverse corrugations upon the periphery of such movable tracks or farm tractors or other farm machinery, the operation of which upon the highway would otherwise be prohibited under this act.

History: En. Sec. 146, Ch. 263, L. 1955.

32-21-150. Safety glazing material in motor vehicles. (a) On and after January 1, 1956, no person shall sell any new motor vehicle as specified herein, nor shall any new motor vehicle as specified herein be registered thereafter unless such vehicle is equipped with safety glazing material wherever glazing material is used in doors, windows, and windshields. The foregoing provisions shall apply to all passenger-type motor vehicles, including passenger buses and school buses, but in respect to trucks, including truck tractors, the requirements as to safety glazing material shall apply to all glazing material used in doors, windows, and windshields in the driver's compartments of such vehicles.

(b) The term "safety glazing materials" means glazing materials so constructed, treated or combined with other materials as to reduce substantially in comparison with ordinary sheet glass or plate glass, the likelihood of injury to persons by objects from exterior sources or by these safety glazing materials when they may be cracked or broken.

History: En. Sec. 147, Ch. 263, L. 1955.

32-21-151. Certain vehicles to carry flares or other warning devices.

(a) No person shall operate any motor truck of one (1) ton capacity or greater, passenger bus, or truck tractor upon any highway outside the corporate limits of municipalities at any time unless there shall be carried in such vehicle the following equipment except as provided in paragraph (b):

1. At least three (3) flares or three (3) red electric lanterns or three (3) portable red emergency reflectors each of which shall be capable of being seen and distinguished at a distance of not less than six hundred (600) feet under normal atmospheric conditions at nighttime.

No portable reflector unit shall be used for the purpose of compliance with the requirements of this section unless it is so designed and constructed as to display a minimum of twenty-four (24) square inches of reflective surface, or two (2) reflecting elements; one above the other, either of which shall be capable of reflecting red light clearly visible from all distances within six hundred (600) feet to one hundred (100) feet under normal atmospheric conditions at night when directly in front of lawful upper beams of head lamps.

2. At least three (3) red-burning fusees unless red electric lanterns or red portable emergency reflectors are carried.

3. At least two (2) red-cloth flags, no less than twelve (12) inches square, with standards to support such flags.

(b) No person shall operate at the time and under the conditions stated in paragraph (a) any motor vehicle used for the transportation of explosives, any cargo tank truck used for the transportation of flammable liquids or compressed gases, or any motor vehicle using compressed gas as a fuel unless there shall be carried in such vehicle three (3) red electric lanterns or three (3) portable red emergency reflectors meeting the requirements of paragraph (a) of this section, and there shall not be carried in any said vehicle any flares, fusees, or signal produced by flame.

History: En. Sec. 148, Ch. 263, L. 1955;
amd. Sec. 1, Ch. 108, L. 1957.

32-21-152. Display of warning devices when vehicle disabled. (a) Whenever any motor truck, passenger bus, truck, tractor, trailer, semi-trailer, or pole trailer is disabled upon the traveled portion of any highway or the shoulder thereof outside of any municipality at any time when lighted lamps are required on vehicles the driver of such vehicle shall display the following warning devices upon the highway during the time the vehicle is so disabled on the highway except as provided in paragraph (b):

1. A lighted fusee, a lighted red electric lantern or a portable red emergency reflector shall be immediately placed at the traffic side of the vehicle in the direction of the nearest approaching traffic.

2. As soon thereafter as possible but in any event within the burning period of the fusee (15 minutes), the driver shall place three (3) liquid burning flares (pot torches), or three (3) lighted red electric lanterns or three (3) portable red emergency reflectors on the traveled portion of the highway in the following order:

(I) One (1), approximately one hundred (100) feet from the disabled vehicle in the center of the lane occupied by such vehicle and toward traffic approaching in that lane.

(II) One (1), approximately one hundred (100) feet in the opposite direction from the disabled vehicle and in the center of the traffic lane occupied by such vehicle.

(III) One (1), at the traffic side of the disabled vehicle not less than ten (10) feet rearward or forward thereof in the direction of the nearest approaching traffic. If a lighted red electric lantern or a red portable emergency reflector has been placed at the traffic side of the vehicle in accordance with paragraph (I) of this section, it may be used for this purpose.

(b) Whenever any vehicle referred to in this section is disabled within five hundred (500) feet of a curve, hillcrest, or other obstruction to view, the warning signal in that direction shall be so placed as to afford ample warning to other users of the highway, but in no case less than five hundred (500) feet from the disabled vehicle.

(c) Whenever any vehicle of a type referred to in this section is disabled upon any roadway of a divided highway during the time that lights are required, the appropriate warning devices prescribed in paragraphs (a) and (e) of this section shall be placed as follows:

One (1) at a distance of approximately two hundred (200) feet from the vehicle in the center of the lane occupied by the stopped vehicle and in the direction of traffic approaching in that lane; one (1) at a distance of approximately one hundred (100) feet from the vehicle, in the center of the lane occupied by the vehicle and in the direction of traffic approaching in that lane; one (1) at the traffic side of the vehicle and approximately ten (10) feet from the vehicle in the direction of the nearest approaching traffic.

(d) Whenever any vehicle of a type referred to in this section is disabled upon the traveled portion of a highway or the shoulder thereof outside of any municipality at any time when the display of fusees, flares, red electric lanterns or portable red emergency reflectors is not required, the driver of the vehicle shall display two (2) red flags upon the roadway in the lane of traffic occupied by the disabled vehicle, or at a distance of approximately one hundred (100) feet in advance of the vehicle, and one (1) at a distance of approximately one hundred (100) feet to the rear of the vehicle.

(e) Whenever any motor vehicle used in the transportation of explosives or any cargo tank truck used for the transportation of any flammable liquid or compressed flammable gas, or any motor vehicle using compressed gas as a fuel, is disabled upon any highway of this state at any time or place mentioned in paragraph (a) of this section, the driver of such vehicle shall immediately display the following warning devices: one (1) red electric lantern or portable red emergency reflector placed on the roadway at the traffic side of the vehicle and two (2) red electric lanterns or portable red reflectors, one (1) placed approximately one hundred (100) feet to the front and one (1) placed approximately one hundred (100) feet to the rear of the disabled vehicle in the center of the traffic lane occupied by such vehicle. Flares, fusees, or signals produced by flame shall not be used as warning devices for disabled vehicles of the type mentioned in this paragraph.

(f) The flares, fusees, red electric lanterns, portable red emergency reflectors and flags to be displayed as required in this section shall conform with the requirements of section 32-21-151 applicable thereto.

History: En. Sec. 149, Ch. 263, L. 1955.

DECISIONS UNDER FORMER LAW

<p>Negligence : Driver of truck was negligent in allowing the truck, which had run out of gas, to stand on highway at nighttime without</p>	<p>placing flares required by Laws 1943, Chapter 199, Section 8. Burns v. Fisher, 132 M 26, 313 P 2d 1044, 1048, 67 ALR 2d 1.</p>
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32-21-153. Vehicles transporting explosives. Any person operating any vehicle transporting any explosive as a cargo or part of a cargo upon a highway shall at all times comply with the provisions of this section.

(a) Said vehicle shall be marked or placarded on each side and the rear with the word "EXPLOSIVES" in letters not less than eight (8) inches high, or there shall be displayed on the rear of such vehicle a red flag not less than twenty-four (24) inches square marked with the word "DANGER" in white letters six (6) inches high.

(b) Every said vehicle shall be equipped with not less than two (2) fire extinguishers, filled and ready for immediate use, and placed at a convenient point on the vehicle so used.

(c) The board is hereby authorized and directed to promulgate such additional regulations governing the transportation of explosives and other dangerous articles by vehicles upon the highway as it shall deem advisable for the protection of the public.

History: En. Sec. 150, Ch. 263, L. 1955.

vehicles transporting explosives, secs. 69-1925, 69-1926.

Cross-Reference

Other provisions relating to marking

32-21-154. Vehicles without required equipment or in unsafe condition.

No person shall drive or move on any highway any motor vehicle, trailer, semitrailer, or pole trailer, or any combination thereof unless the equipment upon any and every said vehicle is in good working order and adjustment as required in this act and said vehicle is in such safe mechanical condition as not to endanger the driver or other occupant or any person upon the highway.

History: En. Sec. 151, Ch. 263, L. 1955.

Collateral References

Automobiles 6.

60 C.J.S. Motor Vehicles § 26.

5A Am. Jur. 280, Automobiles and Highway Traffic, § 76.

Compiler's Note

Sections 32-21-154 to 32-21-156 comprised Article XV of Ch. 263, Laws 1955 entitled "Inspection of Vehicles."

32-21-155. Inspections by officers of the department. (a) The supervisor, members of the state highway patrol, and such other officers and employees of the department as the supervisor may designate, may at any time upon reasonable cause to believe that a vehicle is unsafe or not equipped as required by law, or that its equipment is not in proper adjustment or repair, require the driver of such vehicle to stop and submit such vehicle to an inspection and such test with reference thereto as may be appropriate.

(b) In the event such vehicle and its equipment are found to be in safe condition and in full compliance with the law, the officer making such inspection may issue to the driver an official certificate of inspection and approval of such vehicle specifying those parts or equipment so inspected and approved.

(c) In the event such vehicle is found to be in unsafe condition or any required part or equipment is not present or is not in proper repair and adjustment the officer shall give a written notice to the driver and shall send a copy to the board. Said notice shall specify the deficiencies and require that such vehicle be placed in safe condition and its equipment in proper repair and adjustment within five (5) days.

History: En. Sec. 152, Ch. 263, L. 1955.

32-21-156. Owners and drivers to comply with inspection laws. (a) No person driving a vehicle shall refuse to submit such vehicle to an inspection and test when required to do so by the supervisor or an authorized officer or employee of the department.

(b) Every owner or driver, upon receiving a notice as provided in section 32-21-155, shall comply therewith and shall within five (5) days have the deficiencies corrected and shall forward notification of such correction to the board. In lieu of compliance with this paragraph the vehicle shall not be operated, except as provided in the next succeeding paragraph.

(c) No person shall operate any vehicle after receiving a notice with reference thereto as above provided, except as may be necessary to return such vehicle to the residence or place of business of the owner or driver, if within a distance of twenty (20) miles, or to a garage, until said vehicle and its equipment has been placed in proper repair and adjustment and otherwise made to conform to the requirements of this act.

History: En. Sec. 153, Ch. 263, L. 1955.

32-21-157. Penalties for misdemeanor. (a) It is a misdemeanor for any person to violate any of the provisions of this act unless such violation is by this act or other law of this state declared to be a felony.

(b) Every person convicted of a misdemeanor for a violation of any of the provisions of this act for which another penalty is not provided shall for a first conviction thereof be punished by a fine of not less than ten dollars (\$10.00) nor more than one hundred dollars (\$100.00) or by imprisonment for not more than ten (10) days; for a second conviction within one (1) year thereafter such person shall be punished by a fine of not less than twenty-five dollars (\$25.00) nor more than two hundred dollars (\$200.00) or by imprisonment for not more than twenty (20) days or by both such fine and imprisonment; upon a third or subsequent conviction within one (1) year after the first conviction such person shall be punished by a fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00) or by imprisonment for not more than six (6) months or by both fine and imprisonment.

(c) On failure of payment of fines, the offender, in cases of misdemeanor, shall be imprisoned in the county jail in the county in which the offense has been committed, and said imprisonment shall be computed upon the basis of two dollars (\$2.00) of said fine for each day's incarceration.

(d) Upon conviction the court costs, or any part thereof, may also be assessed against the defendant in the discretion of the court.

History: En. Sec. 154, Ch. 263, L. 1955.

Compiler's Note

This section comprised Article XVI of Ch. 263, Laws 1955 entitled "Penalties and Disposition of Fines and Forfeitures."

Collateral References

Automobiles § 359.
61 C.J.S. Motor Vehicles § 594.

32-21-158. Uniformity of interpretation. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History: En. Sec. 155, Ch. 263, L. 1955.

Compiler's Note

Sections 32-21-158 to 32-21-160 com-

prised Article XVII of Ch. 263, Laws 1955 entitled "Effect of and Short Title of Act."

32-21-159. Short title. This act may be cited as the Uniform Act Regulating Traffic on Highways.

History: En. Sec. 156, Ch. 263, L. 1955.

32-21-160. Constitutionality. If any part or parts of this act shall be held to be unconstitutional, such unconstitutionality shall not affect the validity of the remaining parts of this act. The legislature hereby declares that it would have passed the remaining parts of this act if it had known that such part or parts thereof would be declared unconstitutional.

History: En. Sec. 157, Ch. 263, L. 1955.

32-21-161. Commercial tow car requirements. Every commercial tow car used to tow a vehicle by means of a crane, hoist, tow bar, tow line, or dolly shall:

(a) Be equipped with and carry not less than two (2) red flares or two (2) red lanterns or two (2) warning lights or reflectors, which reflectors shall be of a type approved by the Montana highway patrol board.

(b) Be equipped with at least two (2) highway warning signs of a uniform type prescribed by the Montana highway patrol board and shall be so designed as to be visible both day and night. The operator of a commercial tow car used for the purpose of rendering assistance to other vehicles shall, when the rendering of assistance necessitates the obstruction of any portion of the roadway outside a business or residence district, place a highway warning sign two hundred (200) feet in advance of and two hundred (200) feet to the rear of the disabled vehicle, except as otherwise provided in this section. When a motor vehicle is disabled on the highway, such tow car operator called to render assistance during the hours of darkness shall immediately upon arrival place warning signs upon the highway as prescribed in this section and in addition thereto shall place not less than one (1) red flare, red lantern or warning light or reflector in close proximity to each warning sign.

(c) Be equipped with and carry a fire extinguisher of at least two (2) quart capacity of a type capable of extinguishing a fire.

(d) Be equipped with a lamp emitting a flashing or steady red light mounted on top of the cab of the tow car or on the top of the crane or hoist if such light can be seen from the front of the tow car. The light from such lamp must be visible for a distance of one thousand (1,000) feet under normal atmospheric conditions, and shall be mounted in such a manner that it can be securely fastened with the lens of the lamp facing the rear of the tow car upon which it is mounted. When standing at the location from which the disabled vehicle is to be towed, the operator of the tow car may unfasten the red light and place it in any position deemed advisable to warn approaching drivers. When the disabled vehicle is ready for towing the red light must be turned to rear of the tow car upon which it is mounted and securely locked in this position. Additional red lights of an approved type may be displayed at either or both sides of the tow car as the case may warrant during the period of preparation at the location from which the disabled vehicle is to be towed.

(e) Be equipped with one (1) or more brooms and the operator of the tow car engaged to remove a disabled vehicle from the scene of an accident shall remove all glass and debris deposited upon the roadway by the disabled vehicle which is to be towed.

(f) Be equipped with and carry a shovel and whenever practical the tow car operator engaged to remove any disabled vehicle shall spread dirt upon that portion of the roadway where oil or grease has been deposited by such disabled vehicle.

(g) Be equipped with and carry a portable electrical extension cord for use in displaying a light on the rear of the disabled vehicle. The length of such extension cord shall not be less than the length of the combined vehicles and whenever a disabled vehicle is towed during the hours of darkness and the rear lamp or lamps on the disabled vehicle cannot be lighted, the tow car operator shall provide for such rear light by means of the extension cord herein referred to.

The owner or operator of a commercial tow car who complies with the requirements of this section may stop or park such tow car upon a highway for the purpose of rendering assistance to a disabled vehicle, notwithstanding other provisions of this code.

History: En. Sec. 1, Ch. 201, L. 1959.

effectiveness of lighting equipment. 30 ALR 2d 1053.

Collateral References

Liability for injury incident to towing automobile as affected by availability and

Regulation of vehicle wrecker or towing service business. 42 ALR 2d 1208.

32-21-162. Penalty. Any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor and subject to a penalty not to exceed one hundred dollars (\$100.00).

History: En. Sec. 2, Ch. 201, L. 1959.

32-21-163. Unlawful operation by child under eighteen—exclusive jurisdiction of district court—penalties—impounding of vehicle, when. The district courts of the state of Montana shall have exclusive original jurisdiction in all proceedings concerning the unlawful operation of motor vehicles by children under the age of eighteen (18) years. Whenever, after a hearing before the court, it shall be found that a child under the age of eighteen (18) years has unlawfully operated a motor vehicle, the court may (a) impose a fine, not exceeding fifty dollars (\$50.00), (b) may revoke the driver's license of such child, or suspend the same for such time as may be fixed by the court, and (c) may order any motor vehicle owned or operated by such child to be impounded by the probation officer for such time, not exceeding sixty (60) days, as shall be fixed by the court; provided, however, that if the court shall find that the operation of such motor vehicle was without the consent of the owner, then such vehicle shall not be impounded. Upon nonpayment of any fine herein provided for, the court may order that any motor vehicle owned by said child or operated by said child with the consent of the owner shall be impounded until the fine shall be paid, or may order that the driver's license of such child shall be taken up and held by the probation officer until payment of said fine, or may cause both said motor vehicle and said driver's license

to be taken up and impounded until such fine shall be paid; but no child shall be committed to or held in any detention facility or jail by reason of nonpayment of such fine.

History: En. Sec. 1, Ch. 215, L. 1959.

32-21-164. Summons—issuing to child under eighteen. Whenever any child under the age of eighteen (18) years shall unlawfully operate a motor vehicle in the presence of any peace officer of any county, city or town, or in the presence of any state highway patrolman, such officer may deliver to said child a form of summons describing the nature of the offense, with instructions thereon to report to the district court of the county wherein the offense occurs; and the court shall be informed thereof by the delivery of a copy of said summons to the probation officer, who shall in turn deliver the same to the district judge.

History: En. Sec. 2, Ch. 215, L. 1959.

32-21-165. Court learning of unlawful operation by child under eighteen—authority. Whenever the court shall be informed that a child has unlawfully operated a motor vehicle said child shall be required to appear before the court and the court shall, after a hearing and investigation, take action as provided in section 32-21-163, or may dismiss the proceeding if it be found and determined that it is for the best interests of the child so to do.

History: En. Sec. 3, Ch. 215, L. 1959.

TITLE 33

HOMESTEADS

Chapter 1. Homesteads, 33-101 to 33-129.

CHAPTER 1

HOMESTEADS

- Section 33-101. Homestead—of what it consists.
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33-101. (6945) Homestead—of what it consists. The homestead consists of the dwelling house in which the claimant resides, and the land on which the same is situated, selected as in this chapter provided.

History: Earlier homestead acts were Sec. 194, p. 81, Bannack Stat.; Secs. 1-9, pp. 77-79, L. 1869; re-en. Secs. 261-269, pp. 84-85, Cod. Stat. 1871; re-en. Secs. 311-319, pp. 123-125, L. 1877; amd. by act of February 15, 1879; re-en. Secs. 311-319, First Div. Rev. Stat. 1879; re-en. Secs. 322-330, Comp. Stat. 1887.

This section en. Sec. 1670, Civ. C. 1895; re-en. Sec. 4694, Rev. C. 1907; re-en. Sec. 6945, R. C. M. 1921. Cal. Civ. C. Sec. 1237.

Cross-References

Decedents' estates, setting apart homestead, secs. 91-2501 to 91-2507.

Divorce cases, disposal of homestead, secs. 21-145 to 21-147.

Liberal Construction

The purpose of the homestead statutes is to carry out the mandate of the constitution, “that the legislative assembly shall enact liberal homestead and exemptions laws.” *Mitchell v. McCormick*, 22 M 249, 252, 56 P 216.

Homestead exemption laws were enacted for the benefit of the debtor and should be liberally construed in his favor. *Oregon Mtg. Co., Ltd. v. Dunbar et al.*, 87 M 603, 606, 289 P 559.

Lien on Homesteads

A money judgment cannot be impressed as a lien on a homestead without a showing that the money was borrowed for the purpose of buying the homestead, it not being sufficient that the money did buy the homestead. *Mitchell v. McCormick*, 22 M 249, 253, 56 P 216.

Probate Homestead

The homestead authorized to be selected by the probate court under section 91-2402, where none was selected prior to the death of decedent, is the homestead provided for by sections 33-101 to 33-104, and therefore the value and extent of it must not be any greater than as prescribed by those sections. In *re Trepp's Estate*, 71 M 154, 160, 162, 227 P 1005.

Property Selected as Homestead

A homestead may be claimed upon an undivided interest in land. *Wall v. Dugan et al.*, 76 M 239, 245 P 953.

Where the owner of two contiguous tracts of agricultural land upon each of which there was a dwelling house, worked the land as a unit through a tenant, the owner sometimes residing in the one house and sometimes in the other according to whether the one or the other was occupied by the tenant, the fact of such tenancy did not bar the owner of the right to select the lands as a homestead. *Oregon Mtg. Co., Ltd. v. Dunbar et al.*, 87 M 603, 606, 289 P 559.

References

Cited or applied as section 1670, Civil Code, in *Yerrick v. Higgins*, 22 M 502, 505, 57 P 95; *Vincent v. Vineyard*, 24 M 207, 213, 61 P 131; *McCarthy v. Kelley et al.*, 63 M 233, 236, 206 P 782; *De Fontenay v. Childs*, 93 M 480, 485, 19 P 2d 650.

Collateral References

Homestead \Rightarrow 58.
40 C.J.S. Homestead § 52.
26 Am. Jur. 1 et seq., Homestead.

33-102. (6946) From what it may be selected. If the claimant be married, the homestead may be selected from the property of the husband, or, with the consent of the wife, from her separate property. When the claimant is not married, but is head of a family, within the meaning of section 33-125, the homestead may be selected from any of his or her property.

History: En. Sec. 1671, Civ. C. 1895; re-en. Sec. 4695, Rev. C. 1907; re-en. Sec. 6946, R. C. M. 1921. Cal. Civ. C. Sec. 1238.

Collateral References

Homestead \Rightarrow 38.

Exemption of proceeds of voluntary sale of homestead. 1 ALR 483 and 46 ALR 814.

Scope and import of term "owner" in statute relating to real property. 2 ALR 778, at p. 793 and 95 ALR 1085, at p. 1095.

Failure of head of family to claim homestead exemption as affecting other members of family. 33 ALR 611.

Validity of contractual stipulations waiving debtor's exemption. 47 ALR 300.

Misconduct of surviving spouse as affecting marital rights in other's estate. 71 ALR 277, at p. 286 and 139 ALR 486, at p. 499.

Inclusion of different tracts or parcels in homestead. 73 ALR 116.

Homestead as subject to assessment for local improvements. 79 ALR 712.

Time of which, and extent to which, homestead exemption attaches to property received in exchange for homestead. 83 ALR 54.

Estate or interest in real property to which a homestead claim may attach. 89 ALR 511 and 74 ALR 2d 1355.

Effect of divorce on homestead. 97 ALR 1095.

One who supports (or is under a duty to support) in whole or part relatives who do not live with him as "head of family," "householder," etc., within homestead exemption statute. 118 ALR 1386.

Creation of homestead right in real estate as affecting previous mortgage, trust deed, or purchase money or vendor's lien. 123 ALR 427.

Multiple dwelling house part of which is occupied by owners as subject of homestead. 128 ALR 1431.

Extent of exemption of proceeds of voluntary sale of homestead as affected by lien or encumbrance. 161 ALR 1256.

Purchase of homestead as fraud on creditors. 161 ALR 1287.

Homestead exemption as extending to rentals derived from homestead property. 40 ALR 2d 897.

Homestead rights as affecting accountability of cotenant for rents and profits or use and occupation. 51 ALR 2d 437.

40 C.J.S. Homestead § 43.

26 Am. Jur. 55-58, Homestead, §§ 87-91.

Validity of homestead declarations filed after bankruptcy. 145 ALR 501.

33-103. (6947) Separate property of wife. The homestead cannot be selected from the separate property of the wife, without her consent, shown by her making, or joining in making, the declaration of homestead.

History: En. Sec. 1672, Civ. C. 1895; re-en. Sec. 4696, Rev. C. 1907; re-en. Sec. 6947, R. C. M. 1921. Cal. Civ. C. Sec. 1239.

Selection as Tenants in Common

Where a wife does not join in a home-

stead declaration on property owned by them as tenants in common, the exemption from attachment or execution does not attach to her interest. *Isom v. Larson*, 78 M 395, 400, 255 P 1049.

33-104. (6948) Exempt from forced sale. The homestead is exempt from execution or forced sale, except as in this chapter provided.

History: En. Sec. 1673, Civ. C. 1895; re-en. Sec. 4697, Rev. C. 1907; re-en. Sec. 6948, R. C. M. 1921. Cal. Civ. C. Sec. 1240.

Cross-Reference

Exemption from execution, sec. 93-5818.

Declaration after Attachment

The filing of a homestead declaration after a writ of attachment had been levied upon the land exempts the land from sale on execution obtained after the declaration was filed. *Wall v. Duggan et al.*, 76 M 239, 245, 245 P 953.

Liberal Construction

Homestead exemption laws were enacted for the benefit of the debtor and should be liberally construed in his favor. *Oregon Mtg. Co., Ltd. v. Dunbar et al.*, 87 M 603, 608, 289 P 559.

Nonjoinder by Wife

Where a wife does not join in a homestead declaration on property owned by them as tenants in common, the exemption from attachment or execution does not attach to her interest. *Isom v. Larson*, 78 M 395, 400, 255 P 1049.

References

Cited or applied as section 1673, Civil Code, in *Vincent v. Vineyard*, 24 M 207, 214, 61 P 131.

Collateral References

Homestead \Rightarrow 12.

40 C.J.S. Homestead § 3.

Rights of surviving spouse and children in proceeds of sale of homestead in decedent's estate. 6 ALR 2d 515.

33-105. (6949) When subject to execution or forced sale. The homestead is subject to execution or forced sale in satisfaction of judgments obtained:

1. Before the declaration of homestead was filed for record, and which constitute liens upon the premises; but no judgments obtained before this code takes effect shall constitute such liens;

2. On debts secured by mechanics' or vendors' liens upon the premises;

3. On debts secured by mortgages on the premises, executed and acknowledged by the husband and wife, or by an unmarried claimant;

4. On debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record.

History: En. Sec. 1674, Civ. C. 1895; re-en. Sec. 4698, Rev. C. 1907; re-en. Sec. 6949, R. C. M. 1921. Cal. Civ. C. Sec. 1241.

Filing of Declaration after Levy of Attachment

The filing of a homestead declaration after a writ of attachment had been levied upon the land exempts the land from sale on execution obtained after the declaration was filed. *Wall v. Duggan et al.*, 76 M 239, 244, 245, 245 P 953.

The exemption statute which, by failing to include a homestead subject to attachment within the exceptions to the general rule that a homestead is exempt

from execution, in effect declares that the lien of an attachment does not operate to defeat a homestead declaration, enters into and constitutes a part of a contract of sale of goods; therefore, to uphold a homestead declaration filed after the seller had caused an attachment to be levied on the land sought to be homesteaded by the buyer, would not destroy a vested right secured to him by the lien. *Wall v. Duggan et al.*, 76 M 239, 244, 245, 245 P 953.

Liens against Homesteads

A homestead is subject to the lien of a mechanic for material, as well as labor,

where the material is the object of the labor for which he claims his lien. *Merrigan v. English*, 9 M 113, 125, 22 P 454. See *Bonner v. Minnier*, 13 M 269, 275, 34 P 30.

A homestead is not exempt from foreclosure and sale to satisfy a lien for materials used by the owner in the improvement thereof, such lien being a "mechanic's lien" within the meaning of a statute providing that the exemption of homesteads from forced sale shall not affect any laborer's or mechanic's lien. *Bonner v. Minnier*, 13 M 269, 275, 34 P 30.

A judgment docketed in 1892 was not a lien on the homestead subject to execution under this section, and a mortgage of the homestead given in 1895 took precedence over such judgment. *Vincent v. Vineyard*, 24 M 207, 214, 61 P 131.

Loans for Purchase of Homestead

In an action to quiet title to land claimed by plaintiff as a homestead, defendant judgment creditor asserted that he had advanced the money for the purchase of the property and that under the doctrine of subrogation he had a vendor's lien upon the premises which entitled him to subject the land to sale on execution. However, in the absence of evidence that the money was loaned for the purpose of purchasing the homestead, the claim of vendor's lien may not be upheld, even though the money was actually used for that purpose. *De Fontenay v. Childs*, 93 M 480, 487, 19 P 2d 650.

Mortgage of Homestead

A mortgage of a homestead was void, and not subject to foreclosure, unless executed by the husband and wife, and the acknowledgment was an essential part of the execution by the wife. The abandonment of the homestead did not make valid a past mortgage which was void ab initio. *American Sav. etc. Assn. v. Burghardt*, 19 M 323, 326, 48 P 391.

A homestead can be had in lands belonging to the United States. All the improvements upon the land, including fences, belong to the homestead, and cannot be taken by a creditor. Where a mortgage was given upon the homestead property by the husband, who afterward abandoned his wife, and the latter had not joined in the execution of the instrument, she was entitled to be protected in the enjoyment of the mortgaged premises as against the mortgagee seeking to foreclose the mortgage. *Watterson v. E. L. Bonner Co.*, 19 M 554, 555, 48 P 1108.

Where a mortgage was "executed and recorded before the declaration of home-

stead was filed for record," as required by this section, but had lost its validity by lapse of time as a security and ceased to be a mortgage or lien under section 52-206, held, that although the note which the mortgage was given to secure was still alive, and a money judgment obtained on the note, the homestead was not subject to execution or forced sale to satisfy such judgment, because the mortgage was outlawed and the debt therefore not "secured" by it when the judgment on the note was entered. *Siuru v. Sell*, 108 M 438, 442, 91 P 2d 411.

Waiver of Exemptions

While advance general waivers of the exemption laws are void as contravening public policy, where a homestead claimant mortgages it with full knowledge of his rights and of the consequences of a relinquishment of his rights to withhold the specific property from forced sale, he waives his exemption if the statutory restrictions in this section and section 33-106, are complied with. *United States Bldg. etc. Assn. v. Stevens*, 93 M 11, 16, 17 P 2d 62.

References

Cited or applied as section 1674, Civil Code, in *Mitchell v. McCormick*, 22 M 249, 251, 56 P 216; *Yerrick v. Higgins*, 22 M 502, 508, 57 P 95.

Collateral References

Homestead \hookrightarrow 90.
40 C.J.S. Homestead § 93.
26 Am. Jur. 66, Homestead, §§ 103 et seq.

Validity of statute reducing or abolishing homestead exemption as against particular classes of claims. 6 ALR 1140.

Effect of exemptions as against fines, penalties, and costs. 10 ALR 770.

Lien of tax collector's bonds. 54 ALR 1285.

Mechanic's or materialman's lien on homestead. 65 ALR 1192.

Homestead as subject to assessment for local improvements. 79 ALR 712.

Who are within constitutional or statutory provisions subjecting homesteads to claims of laborers, servants or the like. 114 ALR 767.

Homestead as subject as to right of public to reimbursement for financial assistance to aged person. 29 ALR 2d 744.

Enforcement of claim for alimony or support, or for attorney's fees and costs incurred in connection therewith, against homestead exemption. 54 ALR 2d 1428.

33-106. (6950) How conveyed or encumbered. The homestead of a married person cannot be conveyed or encumbered unless the instrument

by which it is conveyed or encumbered is executed and acknowledged by both husband and wife.

History: En. Sec. 1675, Civ. C. 1895; re-en. Sec. 4699, Rev. C. 1907; re-en. Sec. 6950, R. C. M. 1921. Cal. Civ. C. Sec. 1242.

Mortgage of Homestead

While courts have held that advance general waivers in executory contracts of the exemption laws are void as contravening public policy, where a homestead claimant, with full knowledge of his rights in the premises and of the consequences of a relinquishment of his rights to withhold the specific property from forced sale, mortgages it, he waives his exemption if the statutory restrictions found in section 33-105, and this section are complied with. *United States Bldg. etc. Assn. v. Stevens*, 93 M 11, 16, 17, 17 P 2d 62.

References

American Sav. etc. Assn. v. Burghardt, 19 M 323, 326, 48 P 391; *Watterson v. E. L. Bonner Co.*, 19 M 554, 557, 48 P 1108; *Brown et al. v. Timmons et al.*, 79 M 246, 255, 256 P 176; *Siuru v. Sell*, 108 M 438, 445, 91 P 2d 411.

Collateral References

Homestead ⇨ 118, 119.
40 C.J.S. *Homestead* §§ 129 et seq., 137.
26 Am. Jur. 82, *Homestead*, §§ 128 et seq.

Action for damage against signing spouse for breach of contract to convey homestead signed by one spouse only. 4 ALR 1272 and 16 ALR 1036.

Validity and effect of alienation or encumbrance of homestead without joinder or consent of wife. 45 ALR 395.

33-107. (6951) How abandoned. A homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged:

1. By the husband and wife, if the claimant is married;
2. By the claimant, if unmarried.

History: En. Sec. 1676, Civ. C. 1895; re-en. Sec. 4700, Rev. C. 1907; re-en. Sec. 6951, R. C. M. 1921. Cal. Civ. C. Sec. 1243.

Alienation of Homestead

In the absence of legislation to that effect, alienation of a homestead granted to a surviving wife does not constitute an abandonment of it. *Kerlee v. Smith*, 46 M 19, 23, 124 P 777.

References

United States Bldg. etc. Assn. v. Stevens, 93 M 11, 17, 17 P 2d 62.

Collateral References

Homestead ⇨ 154, 166.
40 C.J.S. *Homestead* §§ 157, 163, 172.
26 Am. Jur. 118, *Homestead*, §§ 192 et seq.

Imprisonment as effecting abandonment of homestead. 5 ALR 259.

Loss of homestead rights by wife through absence enforced by act of husband. 42 ALR 1162 and 129 ALR 305.

33-108. (6952) When declaration of abandonment effectual. A declaration of abandonment is effectual only from the time it is filed in the office in which the homestead was recorded.

History: En. Sec. 1677, Civ. C. 1895; re-en. Sec. 4701, Rev. C. 1907; re-en. Sec. 6952, R. C. M. 1921. Cal. Civ. C. Sec. 1244.

Collateral References

Homestead ⇨ 166.
40 C.J.S. *Homestead* § 172.

33-109. (6953) Proceedings on execution against homestead. When an execution for the enforcement of a judgment obtained in a case not within the classes enumerated in section 33-105 is levied upon the homestead, the judgment creditor may apply to the district court of the county in which the homestead is situated, or a judge thereof, for the appointment of persons to appraise the value thereof.

History: En. Sec. 1678, Civ. C. 1895; re-en. Sec. 4702, Rev. C. 1907; re-en. Sec. 6953, R. C. M. 1921. Cal. Civ. C. Sec. 1245.

Cross-Reference

Application of Montana Rules of Civil Procedure to proceeding for appraisalment of homestead, sec. 93-2711-7.

Execution against Excess Value

Judgments not constituting liens cannot be enforced under this section, but, after notice to the claimant and a report of the appraisers that the value of the homestead exceeds two thousand dollars, and that the property can be divided without material injury, execution can be enforced against such excess; if, however, the property cannot be divided, a sale will be ordered and the execution paid from the excess above that amount. *Vincent v. Vineyard*, 24 M 207, 215, 61 P 131.

References

Cited or applied as section 1678, Civil Code, in *Yerrick v. Higgins*, 22 M 502, 507, 57 P 95; *Wall v. Duggan et al.*, 76 M 239, 245 P 953.

Collateral References

Homestead \approx 200.
40 C.J.S. Homestead § 216.

33-110. (6954) Application for appraisalment. The application must be made upon a verified petition, showing:

1. The fact that an execution has been levied upon the homestead;
2. The name of the claimant;
3. That the value of the homestead exceeds the amount of the homestead exemption.

History: En. Sec. 1679, Civ. C. 1895; re-en. Sec. 4703, Rev. C. 1907; re-en. Sec. 6954, R. C. M. 1921. Cal. Civ. C. Sec. 1246.

References

Cited or applied as section 1679, Civil Code, in *Vincent v. Vineyard*, 24 M 207, 214, 61 P 131.

33-111. (6955) Filing petition. The petition must be filed with the clerk of the district court.

History: En. Sec. 1680, Civ. C. 1895; re-en. Sec. 4704, Rev. C. 1907; re-en. Sec. 6955, R. C. M. 1921. Cal. Civ. C. Sec. 1247.

33-112. (6956) Service of petition—notice of hearing. A copy of the petition, with a notice of the time and place of hearing, must be served upon the claimant, at least two days before the hearing.

History: En. Sec. 1681, Civ. C. 1895; re-en. Sec. 4705, Rev. C. 1907; re-en. Sec. 6956, R. C. M. 1921. Cal. Civ. C. Sec. 1248.

33-113. (6957) Appointment of appraisers. At the hearing the judge may, upon proof of the service of a copy of the petition and notice, and of the facts stated in the petition, appoint three disinterested residents and freeholders of the county to appraise the value of the homestead.

History: En. Sec. 1682, Civ. C. 1895; re-en. Sec. 4706, Rev. C. 1907; re-en. Sec. 6957, R. C. M. 1921. Cal. Civ. C. Sec. 1249.

33-114. (6958) Oath of appraisers. The persons appointed, before entering upon the performance of their duties, must take an oath to faithfully perform the same.

History: En. Sec. 1683, Civ. C. 1895; re-en. Sec. 4707, Rev. C. 1907; re-en. Sec. 6958, R. C. M. 1921. Cal. Civ. C. Sec. 1250.

33-115. (6959) Duty of appraisers. They must view the premises and appraise the value thereof, and if the appraised value exceeds the home-

stead exemption, they must determine whether the land claimed can be divided without material injury.

History: En. Sec. 1684, Civ. C. 1895;
re-en. Sec. 4708, Rev. C. 1907; re-en. Sec.
6959, R. C. M. 1921. Cal. Civ. C. Sec. 1251.

33-116. (6960) Report of appraisers—contents. Within fifteen days after their appointment they must make to the judge a report in writing, which report must show the appraised value and their determination upon the matter of a division of the land claimed.

History: En. Sec. 1685, Civ. C. 1895;
re-en. Sec. 4709, Rev. C. 1907; re-en. Sec.
6960, R. C. M. 1921. Cal. Civ. C. Sec. 1252.

33-117. (6961) Setting apart homestead. If, from the report, it appears to the judge that the land claimed can be divided without material injury, he must, by an order, direct the appraisers to set off to the claimant so much of the land, including the residence, as will amount in value to the homestead exemption, and the execution may be enforced against the remainder of the land.

History: En. Sec. 1686, Civ. C. 1895;
re-en. Sec. 4710, Rev. C. 1907; re-en. Sec.
6961, R. C. M. 1921. Cal. Civ. C. Sec. 1253.

33-118. (6962) Order directing sale—when to be made. If, from the report, it appears to the judge that the land claimed exceeds in value the amount of the homestead exemption, and that it cannot be divided, he must make an order directing its sale under execution.

History: En. Sec. 1687, Civ. C. 1895;
re-en. Sec. 4711, Rev. C. 1907; re-en. Sec.
6962, R. C. M. 1921. Cal. Civ. C. Sec. 1254.

Collateral References

Homestead 107, 199.
40 C.J.S. Homestead §§ 117, 216.

33-119. (6963) Amount of bid. At such sale no bid must be received, unless it exceeds the amount of the homestead exemption.

History: En. Sec. 1688, Civ. C. 1895;
re-en. Sec. 4712, Rev. C. 1907; re-en. Sec.
6963, R. C. M. 1921. Cal. Civ. C. Sec. 1255.

33-120. (6964) Application of proceeds of sale. If the sale is made, the proceeds thereof, to the amount of the homestead exemption, must be paid to the claimant, and the balance applied to the satisfaction of the execution.

History: En. Sec. 1689, Civ. C. 1895;
re-en. Sec. 4713, Rev. C. 1907; re-en. Sec.
6964, R. C. M. 1921. Cal. Civ. C. Sec. 1256.

References

Cited or applied as section 1689, Civil Code, in *Vincent v. Vineyard*, 24 M 207, 215, 61 P 131.

33-121. (6965) After sale, money equal to homestead exemption protected. The money paid to the claimant is entitled, for the period of six months thereafter, to the same protection against legal process and the voluntary disposition of the husband, which the law gives to the homestead.

History: En. Sec. 1690, Civ. C. 1895;
re-en. Sec. 4714, Rev. C. 1907; re-en. Sec.
6965, R. C. M. 1921. Cal. Civ. C. Sec. 1257.

Collateral References

Homestead 78.
40 C.J.S. Homestead § 73.

26 Am. Jur. 31, Homestead, §§ 48 et seq.

Exemption of proceeds of voluntary sale of homestead. 1 ALR 483 and 46 ALR 814.

Extent of exemption of proceeds of voluntary sale of homestead as affected by lien or encumbrance. 161 ALR 1256.

33-122. (6966) Compensation of appraisers. The court must fix the compensation of the appraisers, not to exceed three dollars per day each for the time actually engaged.

History: En. Sec. 1691, Civ. C. 1895; re-en. Sec. 4715, Rev. C. 1907; re-en. Sec. 6966, R. C. M. 1921. Cal. Civ. C. Sec. 1258.

33-123. (6967) Costs. The execution creditor must pay the costs of these proceedings in the first instance; but in the cases provided for in sections 33-117 and 33-118 the amount so paid must be added as costs on execution, and collected accordingly.

History: En. Sec. 1692, Civ. C. 1895; re-en. Sec. 4716, Rev. C. 1907; re-en. Sec. 6967, R. C. M. 1921. Cal. Civ. C. Sec. 1259.

253, 56 P 216; Yerrick v. Higgins, 22 M 502, 507, 57 P 95; Wall v. Duggan et al., 76 M 239, 244, 245 P 953.

References

Cited or applied as section 1692, Civil Code, in Mitchell v. McCormick, 22 M 249,

Collateral References

Homestead⇒199.
40 C.J.S. Homestead § 216.

33-124. (6968) Homesteads—quantity and value of land. Homesteads may be selected and claimed:

1. Consisting of any quantity of land not exceeding three hundred and twenty (320) acres used for agricultural purposes, and the dwelling house thereon and its appurtenances, and not included in any town plot, city or village; or

2. A quantity of land not exceeding in amount one-fourth ($\frac{1}{4}$) of an acre, being within a town plot, city or village, and the dwelling house thereon and its appurtenances.

3. Such homestead, in either case, shall not exceed in value the sum of two thousand five hundred dollars (\$2500.00), provided, however, that in any proceedings instituted to determine the value of such homestead, the assessed value of such land, with included appurtenances, if any, and of such dwelling house as appears on the last completed assessment roll preceding the institution of such proceedings shall be prima facie evidence of the value of the property claimed as a homestead.

History: En. Sec. 1693, Civ. C. 1895; re-en. Sec. 4717, Rev. C. 1907; re-en. Sec. 6968, R. C. M. 1921; amd. Sec. 1, Ch. 126, L. 1931; amd. Sec. 1, Ch. 166, L. 1937; amd. Sec. 1, Ch. 50, L. 1941. Cal. Civ. C. Sec. 1260.

Conflicts

There is no conflict between the provisions of this section and section 33-127. Mitchell v. McCormick, 22 M 249, 253, 56 P 216.

Excessive Area

Where a declaration of homestead inadvertently included one-sixth more land than allowed, the whole claim was invalid. Yerrick v. Higgins, 22 M 502, 507, 57 P 95.

While failure to accurately set forth in a homestead declaration the value of the premises does not invalidate it, failure to strictly comply with the requirement that the area claimed must not exceed the statutory limit renders the declaration void. McCarthy v. Kelley et al., 63 M 233, 236, 206 P 782.

Held, under the above rule, that a declaration of homestead covering "an undivided one-half interest and equity" in a 240 acre agricultural tract was void as an attempt to claim as exempt an area greater in quantity than 160 acres allowed by this section. McCarthy v. Kelley et al., 63 M 233, 236, 206 P 782.

The validity of a homestead declaration was not affected by the fact that declarant

included ten acres of farm land in the total of 160 acres selected, which he did not own; not having exceeded the limitation prescribed by statute, the declaration was good as to the remaining 150 acres. *Oregon Mtg. Co., Ltd. v. Dunbar et al.*, 87 M 603, 606, 289 P 559.

Homestead in Land Held in Cotenancy

A cotenant is entitled to a homestead in real estate held in cotenancy. *Lindley v. Davis*, 7 M 206, 213, 14 P 717 (overruling *Lindley v. Davis*, 6 M 453, 13 P 118); *Ferguson v. Speith*, 13 M 487, 495, 497, 34 P 1020.

Homestead in Partnership Property

When a creditor of a partnership has attached real estate belonging to such partnership, the members of the firm cannot, by mutual releases, destroy the nature of the property, or of the tenancy, so that either one of them can annul the lien of attachment by claiming a part of the land as a homestead. *Lindley v. Davis*, 6 M 453, 455, 13 P 118, overruled in *Lindley v. Davis*, 7 M 206, 211, 14 P 717. See *Ferguson v. Speith*, 13 M 487, 497, 34 P 1020.

A partner is entitled, as against the creditors of the firm, to claim and hold a homestead in the partnership estate. *Ferguson v. Speith*, 13 M 487, 489, 34 P 1020.

Land Used for Agricultural Purposes

Lands used by a homestead claimant for grazing horses fall within the provision of this section, that homesteads may comprise land "used for agricultural purposes," the fact that the animals were not used for tilling the soil being immaterial. *De Fontenay v. Childs*, 93 M 480, 485, 19 P 2d 650.

Location of Parcels of Land in Homestead

Conceding, without deciding, that where an agricultural homestead consists of more than one parcel of land, the parcels selected must be contiguous (this section being silent on the subject), where two tracts cornered with each other and were used as one farm, they were contiguous, and a declaration of homestead was not open to the objection of noncontiguity. *Oregon Mtg. Co., Ltd. v. Dunbar et al.*, 87 M 603, 606, 289 P 559.

Necessity for Actual Occupation

Actual occupancy of the land claimed as a homestead is necessary in order to exempt it from sale on execution. *Power v. Burd*, 18 M 22, 43 P 1094.

Probate Homestead

The homestead authorized to be selected by the probate court under section 91-2402, where none was selected prior to the death of decedent, is the homestead provided for by sections 33-101 to 33-104, and therefore the value and extent of it must not be any greater than as prescribed by those sections. In re *Trepp's Estate*, 71 M 154, 160, 162, 227 P 1005.

References

Cited or applied as section 1693, Civil Code, in *Vincent v. Vineyard*, 24 M 207, 213, 61 P 131.

Collateral References

Homestead \hookrightarrow 61-68.

40 C.J.S. Homestead §§ 56-62.

26 Am. Jur. 55-58, Homestead, §§ 87-91.

Validity of homestead declarations filed after bankruptcy. 145 ALR 501.

33-125. (6969) "**Head of family**" defined. The phrase "head of a family" as used in this chapter, includes within its meaning:

1. The husband, when the claimant is a married person, or the wife, where the husband fails to join in the declaration.

2. Every person who has attained the age of sixty years and who actually resides on the premises.

3. Every person who has residing on the premises with him or her, and under his or her care and maintenance, either:

First. His or her minor child, or the minor child of his or her wife or husband, or former wife or husband;

Second. A minor grandchild, brother or sister, or minor child of a brother or sister;

Third. A father, mother, grandfather, or grandmother;

Fourth. The father, mother, grandfather, or grandmother, of a husband or wife; or former husband or wife;

Fifth. An unmarried sister or any other of the relatives mentioned in this section, who have attained the age of majority and are unable to take care of or support themselves.

History: En. Sec. 1694, Civ. C. 1895; re-en. Sec. 4718, Rev. C. 1907; re-en. Sec. 6969, R. C. M. 1921; amd. Sec. 1, Ch. 86, L. 1925. Cal. Civ. C. Sec. 1261.

Abandoned Wife

The expression "head of a family" includes the abandoned wife. *Mennell v. Wells*, 51 M 141, 148, 149 P 954.

Grandchild

Where a widow had residing with her on land claimed by her as a homestead, her daughter and her minor child abandoned by the husband and father, the daughter working off and on and the child, when the daughter worked, being taken care of by claimant, the latter was the "head of a family" within the meaning of subdivision 3 of this section, declaring that one having resided on the premises with him or her, a minor grandchild, is the head of a family. *Esterly v. Broadway Garage Co. et al.*, 87 M 64, 68, 285 P 172.

33-126. (6970) Mode of selection. In order to select a homestead, the husband or other head of a family, or in case the husband has not made such selection, the wife, must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record.

History: En. Sec. 1700, Civ. C. 1895; re-en. Sec. 4719, Rev. C. 1907; re-en. Sec. 6970, R. C. M. 1921. Cal. Civ. C. Sec. 1262.

Alienation Not Abandonment

The alienation of a probate homestead, by the widow, is not an abandonment. *Kerlee v. Smith*, 46 M 19, 23, 124 P 777.

Selection by Wife

When the husband fails to select a home-

Technical Custody of Children

A homestead claimant who at the time of filing his declaration lived on the property with his second wife and three minor children of his first (divorced) wife, and lived thereon at the time of the trial, except that his second wife was then deceased, was the "head of a family" within the meaning of this section, unaffected by the fact that the custody of the children had been awarded to the first wife in the divorce action. *De Fontenay v. Childs*, 93 M 480, 486, 19 P 2d 650.

References

Williams v. Sorenson, 106 M 122, 125, 75 P 2d 784.

Collateral References

Homestead \Rightarrow 18.
40 C.J.S. Homestead § 24.

stead, the wife may select it. *Mennell v. Wells*, 51 M 141, 148, 149 P 954.

Collateral References

Homestead \Rightarrow 41-47.
40 C.J.S. Homestead § 46.
26 Am. Jur. 55-58, Homestead, §§ 87-91.

Separation agreement as barring right to homestead. 34 ALR 2d 1045.

Wife as head of family within homestead exemption provision. 67 ALR 2d 779.

33-127. (6971) Declaration of homestead—must contain what. The declaration of homestead must contain:

1. A statement, showing that the person making it is the head of a family; or, when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit;

2. A statement that the person making it is residing on the premises, and claims them as a homestead;

3. A description of the premises;

4. An estimate of their actual cash value.

History: En. Sec. 1701, Civ. C. 1895; re-en. Sec. 4720, Rev. C. 1907; re-en. Sec. 6971, R. C. M. 1921. Cal. Civ. C. Sec. 1263.

Conflicts

There is no conflict between the provisions of this section and section 33-124. *Mitchell v. McCormick*, 22 M 249, 253, 56 P 216.

Probate Homestead

In selecting a homestead for the family of a decedent where none was selected prior to his death, the probate court may, in the absence of a mode of procedure prescribed by the statute, proceed in substantially the manner indicated by this section et seq., for its selection during the lifetime of a decedent, thereafter follow-

ing the procedure outlined by sections 91-2502 to 91-2507. In *re Trepp's Estate*, 71 M 154, 163, 227 P 1005.

Sufficiency of Declaration

Under an admission that property in controversy is a homestead, and has been set apart as provided by law, it cannot be objected that the homesteader did not allege its statutory value in the declaration of homestead. *Mitchell v. McCormick*, 22 M 249, 252, 56 P 216.

The declaration of homestead must contain the estimated value, not the statutory value. *Mitchell v. McCormick*, 22 M 249, 252, 56 P 216.

A declaration of homestead is valid and effective, though the estimated cash value is far in excess of the limit fixed in the statute, provided it contains the other statements required; but, as to area, the premises described must fall within the statutory limit, otherwise the declaration is ineffective to exempt the property claimed. *Yerrick v. Higgins*, 22 M 502, 508, 57 P 95; *Mitchell v. McCormick*, 22 M 249, 56 P 216, modified.

The requirements of the statute by which a homestead exemption right becomes fixed

are mandatory and must be complied with. *Yerrick v. Higgins*, 22 M 502, 510, 57 P 95.

A declaration of homestead stating that the declarant "is the head of a family" was sufficient as against the contention that under this section it was incumbent upon declarant to state the facts showing that she was such head as defined by section 33-125. *Esterly v. Broadway Garage Co., et al.*, 87 M 64, 68 et seq., 285 P 172.

Value

The homestead consists of the real property described in the declaration, although its value exceeds two thousand five hundred dollars. *Vincent v. Vineyard*, 24 M 207, 214, 61 P 131.

Where a declaration of homestead was filed, the homestead attribute was impressed on all the property described in the declaration, although its value exceeded the sum of two thousand five hundred dollars. *Vincent v. Vineyard*, 24 M 207, 214, 61 P 131.

Collateral References

Homestead Ⓒ 43.

40 C.J.S. Homestead § 46.

33-128. (6972) Declaration must be recorded. The declaration must be recorded in the office of the clerk of the county in which the land is situated.

History: En. Sec. 1702, Civ. C. 1895; re-en. Sec. 4721, Rev. C. 1907; re-en. Sec. 6972, R. C. M. 1921. Cal. Civ. C. Sec. 1264.

33-129. (6973) Tenure by which homestead is held. From and after the time the declaration is filed for record, the premises therein described constitute a homestead. Upon the death of the person whose property was selected as a homestead, it shall go to his or her heirs or devisees, subject to the use of the widow during her life, if the property selected as a homestead, before selection, belonged to the husband; and subject to the use of the husband during his life, if the property selected as a homestead before selection belonged to the wife. And in no case shall the homestead be held liable for the debts of the owner, except as provided in this chapter.

History: En. Sec. 1703, Civ. C. 1895; re-en. Sec. 4722, Rev. C. 1907; re-en. Sec. 6973, R. C. M. 1921. Cal. Civ. C. Sec. 1265.

Bankruptcy Rights

A homestead, being exempt from execution under this section, does not pass to the trustee in bankruptcy where the bankrupt makes claim of exemption, and as to such property sold on mortgage foreclosure, the bankrupt retains his right of redemption which he may transfer, entitling the transferee to make redemption. *Brown et al. v. Timmons et al.*, 79 M 246, 255, 256 P 176.

References

Cited or applied as section 1703, Civil Code, in *Mitchell v. McCormick*, 22 M 249, 252, 56 P 216; *Yerrick v. Higgins*, 22 M 502, 508, 57 P 95; *Vincent v. Vineyard*, 24 M 207, 213, 61 P 131; as section 4722, Revised Codes, in *Kerlee v. Smith*, 46 M 19, 23, 124 P 777; *Wall v. Duggan et al.*, 76 M 239, 244, 245 P 953.

Collateral References

Homestead Ⓒ 47, 134.

40 C.J.S. Homestead §§ 46, 242.

Rights of surviving spouse and children in proceeds of sale of homestead in decedent's estate. 6 ALR 2d 515.

TITLE 34

HOTELS

- Chapter 1. Liability to guests—lien for accommodations—penalty for defrauding, 34-101 to 34-112.
2. Sanitation and control by state board of health, 34-201 to 34-217.
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CHAPTER 1

LIABILITY TO GUESTS—LIEN FOR ACCOMMODATIONS— PENALTY FOR DEFRAUDING

- Section 34-101. Innkeeper's liability.
34-102. How exempted from liability.
34-103. Lien of hotel, boardinghouse and lodginghouse keepers.
34-104. Sale of baggage by boarding- or lodginghouse keepers.
34-105. How exempted from liability.
34-106. Penalty.
34-107. Limitation of innkeeper's liability.
34-108. Liable for loss or damage caused by fire, when.
34-109. Not liable without negligence.
34-110. Enforcement of lien.
34-111. Notice of sale.
34-112. Defrauding inn- and hotel-keepers, etc.—penalty.

34-101. (7673) Innkeeper's liability. An innkeeper is liable for all losses of or injuries to personal property placed by his guests under his care, unless occasioned by an irresistible superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one whom he brought into the inn.

History: En. Sec. 2500, Civ. C. 1895; re-en. Sec. 5164, Rev. C. 1907; re-en. Sec. 7673, R. C. M. 1921. Cal. Civ. C. Sec. 1859. Field Civ. C. Sec. 936.

Cross-Reference

Refusal to receive guests, penalty, sec. 94-35-104.

Collateral References

Innkeepers \Rightarrow 11.
43 C.J.S. Innkeepers § 12.
28 Am. Jur. 585, Innkeepers, §§ 67 et seq.

Improper motive or purpose in going to hotel as affecting one's status as guest, or invitee of a guest, for purpose of determining degree of care owed by proprietor. 16 ALR 1388.

What information must be given by a

guest upon delivering articles into custody of innkeeper. 53 ALR 1048.

Liability of hotel company for loss or damage to guest's baggage while being transported to or from hotel. 76 ALR 1106.

Construction, scope and application of words descriptive of property in statute relating to liability of innkeeper to guest for loss or damage to property. 115 ALR 1088.

Place of posting, and contents of, notice by innkeeper as to safety receptacle for valuables of guests, necessary to comply with statutory provisions in that regard. 119 ALR 796.

Effect of notice limiting liability for valuables or effects of guests in hotel. 9 ALR 2d 818.

Tort liability of innkeeper for theft by servant. 15 ALR 2d 836.

34-102. (7674) How exempted from liability. If an innkeeper keeps a fireproof safe, and gives notice to a guest, either personally or by putting up a printed notice in a prominent place in the room occupied by the guest, that he keeps such a safe, and will not be liable for money, jewelry, docu-

ments, or other articles of unusual value and small compass, unless placed therein, he is not liable, except so far as his own acts contribute thereto, for any loss of or injury to such articles, if not deposited with him, and not required by the guest for present use.

History: En. Sec. 2501, Civ. C. 1895; re-en. Sec. 5165, Rev. C. 1907; re-en. Sec. 7674, R. C. M. 1921. Cal. Civ. C. Sec. 1860. Field Civ. C. Sec. 937.

Collateral References

Innkeepers \S 11(7), 11(11).
43 C.J.S. Innkeepers \S 17.

Effect of notice limiting liability for valuables or effects of guests in hotel. 9 ALR 2d 818.

34-103. (7675) Lien of hotel, boardinghouse and lodginghouse keepers.

Hotel men, boardinghouse and lodginghouse keepers shall have a lien upon the baggage and other property of value brought into such hotel, inn, or boarding- or lodginghouse, by such guest or boarder or lodger, for his accommodation, board, or lodging and room rent, and such extras as are furnished at his request, with the right of the possession of such baggage or other property of value, until all such charges are paid; provided, however, that nothing herein contained shall be construed to give a lien upon property sold on the installment plan, and title to which is to remain in the vendor until final payment.

History: En. Sec. 2502, Civ. C. 1895; amd. Sec. 1, p. 132, L. 1899; re-en. Sec. 5166, Rev. C. 1907; re-en. Sec. 7675, R. C. M. 1921. Cal. Civ. C. Sec. 1861.

Collateral References

Innkeepers \S 13.
43 C.J.S. Innkeepers \S 26.
28 Am. Jur. 624, Innkeepers, $\S\S$ 123 et seq.

Cross-Reference

Agister's liens, secs. 45-1106 to 45-1108.

Innkeeper's lien or right of distress on property sold on conditional sale. 45 ALR 949, 960.

34-104. (7676) Sale of baggage by boarding- or lodginghouse keepers.

Whenever any trunk, carpetbag, valise, box, bundle, or other baggage has heretofore come, or shall hereafter come into the possession of the keeper of any hotel, inn, boarding- or lodginghouse, as such, and has remained, or shall remain unclaimed for the period of six months, such keeper may proceed to sell the same at public auction, and out of the proceeds of such sale may retain the charges for storage, if any, and the expense of advertising and sale thereof; but no such sale shall be made until the expiration of four weeks from the first publication of notice of such sale in a newspaper published in or nearest the city, town, or place in which said hotel, inn, boarding- or lodginghouse is situated. Said notice shall be published once a week for four successive weeks in some newspaper, daily or weekly, of general circulation, and shall contain a description of each trunk, carpetbag, valise, box, bundle, or other baggage, as near as may be; the name of the owner, if known; the name of said keeper and the time and place of sale; and the expenses incurred for advertising shall be a lien upon such trunk, carpetbag, valise, box, bundle, or other baggage, in a ratable proportion, according to the value of such piece of property, or thing, or article sold; and in case any balance arising from such sale shall not be claimed by the rightful owner within one week from the day of said sale, the same shall be paid into the treasury of the county in which

such sale took place; and if the same be not claimed by the owner thereof, or his legal representatives, within one year thereafter, the same shall be paid into the general fund of said county.

History: En. Sec. 2503, Civ. C. 1895;
re-en. Sec. 5167, Rev. C. 1907; re-en. Sec.
7676, R. C. M. 1921. Cal. Civ. C. Sec. 1862.

Collateral References

28 Am. Jur. 632, Innkeepers, § 132.

34-105. (7677) How exempted from liability. Whenever the proprietor or proprietors of any hotel or inn shall provide a safe or other secure place of deposit therein for the safekeeping of any money, jewels, ornaments, or other articles of value, belonging to any guest or guests of such hotel or inn, and shall cause to be posted and maintained printed notices thereof in the office or public room, and within every guest's room of such inn or hotel, the proprietor or proprietors thereof shall not be liable to any such guest or guests who shall neglect to deliver their money, jewels, ornaments, or other articles of value to the proprietor or other person in charge of such safe or place of deposit for deposit and safekeeping therein, for any loss of such money or other articles which may be sustained by such guest by theft or otherwise.

History: En. Sec. 2504, Civ. C. 1895;
re-en. Sec. 5168, Rev. C. 1907; re-en. Sec.
7677, R. C. M. 1921. Cal. Civ. C. Sec. 1860.

43 C.J.S. Innkeepers § 17.

28 Am. Jur. 591, Innkeepers, §§ 74-81.

Tort liability of innkeeper for theft by servant. 15 ALR 2d 836.

Collateral References

Innkeepers 11(7, 11).

34-106. (7678) Penalty. Any person or officer violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail not to exceed ninety days, or by a fine of not more than one hundred dollars, and costs, or both such fine and imprisonment.

History: En. Sec. 2507, Civ. C. 1895;
re-en. Sec. 5171, Rev. C. 1907; re-en. Sec.
7678, R. C. M. 1921.

Collateral References

Innkeepers 15, 16.

43 C.J.S. Innkeepers §§ 27, 28.

34-107. (7679) Limitation of innkeeper's liability. No innkeeper shall be liable for the loss or destruction by fire of the property received by him from a guest, stored or being, with the knowledge of such guest, in a barn or other outbuilding, where it shall appear that such loss or destruction is the work of an incendiary, and occurred without the fault or negligence of such innkeeper or his servants.

History: En. Sec. 2508, Civ. C. 1895;
re-en. Sec. 5172, Rev. C. 1907; re-en. Sec.
7679, R. C. M. 1921.

Liability of automobile bailee-innkeeper for loss of, or damage to, contents. 27 ALR 2d 814.

Liability of innkeeper for loss of or damage to property of a guest resulting from fire. 63 ALR 2d 495.

Collateral References

Innkeepers 11(11).

43 C.J.S. Innkeepers § 20.

28 Am. Jur. 616, Innkeepers, § 106.

34-108. (7680) Liable for loss or damage caused by fire, when. All inn- or hotel-keepers coming within the provisions of this chapter shall be liable for loss of or damage to any baggage or other property of their guests

caused by fire, in every case where such loss or damage is the result of the negligence of such keepers or their servants.

History: En. Sec. 2509, Civ. C. 1895;
re-en. Sec. 5173, Rev. C. 1907; re-en. Sec.
7680, R. C. M. 1921.

34-109. (7681) Not liable without negligence. No hotel- or innkeeper shall be liable to any guest for the loss of wearing apparel, goods, or personal effects, where it shall appear that such loss occurred without the fault or negligence of such hotel-keeper or his employees.

History: En. Sec. 2510, Civ. C. 1895;
re-en. Sec. 5174, Rev. C. 1907; re-en. Sec.
7681, R. C. M. 1921.

34-110. (7682) Enforcement of lien. Any hotel- or innkeeper who shall have a lien upon any of the goods, baggage, or other chattel property of his guests may, at the expiration of six months from the date of the departure of such guest from such hotel or inn, sell and dispose of the same at public auction and to the highest bidder for cash, or so much thereof as may be necessary to pay the sum due such hotel- or innkeeper, together with the cost of storage, advertisement, and sale.

History: En. Sec. 2512, Civ. C. 1895;
re-en. Sec. 5175, Rev. C. 1907; re-en. Sec.
7682, R. C. M. 1921.

Collateral References

Innkeepers 13.
43 C.J.S. Innkeepers § 26.
28 Am. Jur. 632, Innkeepers, § 132.

34-111. (7683) Notice of sale. Before proceeding to the sale of the property of any guest, as provided in the preceding section, such hotel- or innkeeper shall cause a notice of such sale, containing a description of the property to be sold, and the time and place where such property will be sold, to be published once each week for two successive weeks in a newspaper published in the city or town in which such hotel or inn is situated; but if there be none, then in some newspaper published nearest such town or city, and in case any balance arising from such sale shall not be claimed by the rightful owner within thirty days from the day of such sale, the same shall be paid into the treasury of the county in which such sale took place; and if such balance be not claimed by the owner thereof, or his legal representatives, within one year thereafter, the same shall be paid into the school fund of such county.

History: En. Sec. 2513, Civ. C. 1895;
re-en. Sec. 5176, Rev. C. 1907; re-en. Sec.
7683, R. C. M. 1921.

34-112. (7684) Defrauding inn- and hotel-keepers, etc.—penalty. Any person who shall put up at any inn or hotel, restaurant, cafe, apartment, rooming- or boardinghouse, or hospital, and who shall (except where credit is given by agreement) procure any food, entertainment, or accommodation without paying therefor, and with intent to cheat and defraud the owner or keeper thereof out of his pay for same, or who, with intent to cheat and defraud such owner or keeper out of the pay thereof, shall obtain credit at any hotel or inn, restaurant, cafe, apartment, rooming- or boardinghouse, or hospital, for such food, entertainment, or accommodation, by means of any false show of baggage or effects brought thereto, or who

shall, with such intent, remove or cause to be removed any baggage or effects from any hotel or inn, restaurant, cafe, apartment, rooming- or boardinghouse, or hospital, where there is a lien existing thereon for the proper charges due from such guest for fare and board furnished therein, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by imprisonment not exceeding three months, or by fine not exceeding one hundred dollars and costs, or both such fine and imprisonment.

History: En. Sec. 2514, Civ. C. 1895; re-en. Sec. 5177, Rev. C. 1907; amd. Sec. 1, Ch. 9, L. 1917; re-en. Sec. 7684, R. C. M. 1921. Cal. Pen. C. Sec. 537.

NOTE.—This act also appears in the Code as section 94-3550.

References

Saner v. Bowker, 69 M 463, 467, 222 P 1056.

Collateral References

Innkeepers 16.

43 C.J.S. Innkeepers § 28.

28 Am. Jur. 648, Innkeepers, §§ 151, 152.

CHAPTER 2

SANITATION AND CONTROL BY STATE BOARD OF HEALTH

- Section 34-201. Hotel defined—must maintain office and register.
 34-202. Regulation of hotels as to sanitation, plumbing and washroom supplies.
 34-203. Bedrooms and bedding, regulation of.
 34-204. Regulation of cooking utensils, kitchens and dining rooms.
 34-205. Ashes.
 34-206. Fumigation of rooms.
 34-207. State board of health to adopt rules for enforcement of act.
 34-208. Appointment of assistants by state board of health—qualifications.
 34-209. Certificate of inspection—posting.
 34-210. Inspector to file complaints for violation of act—preliminary notice.
 34-211. Disposal of fines.
 34-212. Drinking water.
 34-213. Penalty for violations.
 34-214. Cleansing walls before putting on new paper or wall covering.
 34-215. Duty in case of contagious or infectious disease.
 34-216. County and city boards of health to enforce act.
 34-217. Violation of act a misdemeanor.

34-201. (2485) Hotel defined — must maintain office and register.

Every building or structure kept, used, or maintained as, or advertised as, or held out to the public to be an inn, hotel or public lodginghouse or place where sleeping accommodations are furnished for hire to transient guests, whether with or without meals, in which five or more rooms are used for the accommodation of such transient guests, shall maintain an office and register and for the purpose of this act shall be deemed to be a hotel, and whenever the word hotel shall occur in this act, it shall be construed to mean every such structure as described in this section.

History: En. Sec. 1, Ch. 36, L. 1919; re-en. Sec. 2485, R. C. M. 1921.

Cross-Reference

Powers of board of health with respect to this chapter, sec. 69-105.1.

References

State ex rel. Altop v. City of Billings et al., 79 M 25, 28, 255 P 11.

Collateral References

Innkeepers 3.

43 C.J.S. Innkeepers § 1.

Maintenance or regulation by public authorities of tourist or motor camps, courts or motels. 22 ALR 2d 774.

34-202. (2486) Regulation of hotels as to sanitation, plumbing and washroom supplies. Every hotel shall be well constructed, plumbed and drained according to established sanitary principles; shall be kept clean and in a sanitary condition, free from effluvia arising from any sewer, drain, privy, or other source within control of owner, manager, agent, or other person in charge. All hotels in cities, towns, and villages where a system of waterworks and sewers is maintained for public use, shall be equipped with suitable lavatories and toilet facilities, within the building, for the accommodation of its guests. The sewer must be connected with the public sewer system. Public washrooms must be supplied with clean individual towels or paper towels. Use of the common roller towel is absolutely prohibited. All hotels in cities, towns, or villages not having a public sewer system or waterworks, shall have properly constructed privies, vaults, or other sanitary devices, which shall always be kept clean, properly ventilated, and well-screened from insects and rodents, and shall be provided with tight-fitting self-closing doors. All toilets or privies shall be lighted. The wall or partition between the apartments must be tight. A separate apartment with separate entrance, properly designated and screened from public view, must be provided for each sex. Where septic tanks are installed, they must be constructed according to plans approved by the state board of health.

History: En. Sec. 2, Ch. 36, L. 1919;
re-en. Sec. 2486, R. C. M. 1921.

Cross-References

Fire escape act, violations, sec. 69-1809.
Retiring rooms for employees required
in hotels, secs. 69-2501 to 69-2504.

References

State ex rel. Altop v. City of Billings
et al., 79 M 25, 28, 255 P 11.

Collateral References

Innkeepers 2.
43 C.J.S. Innkeepers § 5.
25 Am. Jur. 302, Health, §§ 24-27.

34-203. (2487) Bedrooms and bedding, regulation of. All bedrooms shall be kept free from vermin, and the bedding shall be clean and sufficient in quantity and quality; all sheets shall be at least eight feet long; each guest shall at all times be furnished with two clean towels; in case bedrooms are carpeted, the carpet or carpets thereon shall be taken up and thoroughly cleaned at least once each year; and in all hotels where fifty cents or more per night is charged for lodging, the sheets and pillow cases shall be changed after the departure of each guest.

History: En. Sec. 3, Ch. 36, L. 1919;
re-en. Sec. 2487, R. C. M. 1921.

Collateral References

28 Am. Jur. 559, Innkeepers, § 32.

Justification of guest in leaving hotel or
boardinghouse before expiration of con-
tract. 10 ALR 127.

What constitutes a hotel or inn. 19 ALR
517.

34-204. (2488) Regulation of cooking utensils, kitchens and dining rooms. No rusted tin or iron vessel or utensil shall be used in cooking food, and all foodstuffs shall be kept in a clean and suitable place, free from dampness and contamination; the closets, cupboards, refrigerators and the floors and walls of all kitchens and dining rooms shall be, at all times, kept free from dirt, and no dust or greases shall be allowed to collect thereon.

History: En. Sec. 4, Ch. 36, L. 1919;
re-en. Sec. 2488, R. C. M. 1921.

Cross-Reference

Oleomargarine, use regulated, sec. 94-35-
146.

34-205. (2489) Ashes. No ashes from any hotel shall be dumped or kept in or adjacent thereto, or in any outhouse connected with any hotel unless the same be placed in a tight metal container with a tight metal lid kept thereon, or be disposed of in such manner as to eliminate any possibility of fire and public nuisances.

History: En. Sec. 5, Ch. 36, L. 1919;
re-en. Sec. 2489, R. C. M. 1921.

34-206. (2490) Fumigation of rooms. Whenever any room in any hotel shall have been occupied by any person having a contagious or infectious disease, the said room shall be thoroughly fumigated under the direction of the health officer, and all bedding therein thoroughly disinfected, before said room shall be occupied by any other person; but, in any event, such room shall not be let to any person for at least twenty-four hours after such fumigation, or disinfection.

History: En. Sec. 6, Ch. 36, L. 1919;
re-en. Sec. 2490, R. C. M. 1921.

34-207. (2491) State board of health to adopt rules for enforcement of act. The state board of health shall adopt all needful rules and regulations for the thorough and uniform enforcement of the provisions of this act throughout the state.

History: En. Sec. 7, Ch. 36, L. 1919;
re-en. Sec. 2491, R. C. M. 1921.

References

State ex rel. Altop v. City of Billings
et al., 79 M 25, 28, 255 P 11.

Collateral References

Innkeepers⌘1.
43 C.J.S. Innkeepers § 4.
25 Am. Jur. 314, Health, §§ 36 et seq.

34-208. (2492) Appointment of assistants by state board of health—qualifications. It shall be the duty of the state board of health and it shall have power, jurisdiction, and authority to engage or appoint such assistants or inspectors as may be needed in enforcing the provisions of this act and the rules and regulations as provided for under the preceding section. Such inspectors or appointees shall possess such qualifications as the state board of health may determine are necessary to successfully carry on the work. The state board of health shall also fix their compensation and shall assign to them their duties.

History: En. Sec. 8, Ch. 36, L. 1919;
re-en. Sec. 2492, R. C. M. 1921.

Collateral References

Health⌘7(1).
39 C.J.S. Health § 7.

34-209. (2493) Certificate of inspection — posting. If the inspector shall find, after the examination of any hotel that the provisions of this act and the rules and regulations of the state board of health adopted in conformity therewith have been fully complied with he shall issue a certificate to the effect to the person operating the same, and said certificate shall be posted in a conspicuous place in said inspected building.

History: En. Sec. 9, Ch. 36, L. 1919;
re-en. Sec. 2493, R. C. M. 1921.

34-210. (2494) Inspector to file complaints for violation of act—preliminary notice. It shall be the duty of the inspector, upon ascertaining by inspection or otherwise, that any hotel or other place or thing required

or allowed by this act to be inspected, is being carried on contrary to the provisions of this act, to make complaint and cause the arrest of the person so violating the same, and it shall be the duty of the county attorney in such case to prepare all necessary papers and conduct such prosecution; provided, however, that no prosecution shall follow until such time as the person conducting or operating such hotel, public inn or lodginghouse, has been notified wherein such hotel, public inn or lodginghouse fails to meet the requirements of this act or the rules and regulations of the state board of health, and such time to remedy the failure as the state board of health or its representatives may rule.

History: En. Sec. 10, Ch. 36, L. 1919;
re-en. Sec. 2494, R. C. M. 1921.

Collateral References

Innkeepers⇒15.
43 C.J.S. Innkeepers § 27.

34-211. (2495) Disposal of fines. All moneys collected for fines under this act shall be turned over to the state treasurer, who shall deposit them to the credit of the general fund.

History: En. Sec. 11, Ch. 36, L. 1919;
amd. Sec. 1, Ch. 84, L. 1921; re-en. Sec.
2495, R. C. M. 1921.

Collateral References

Fines⇒20.
36 C.J.S. Fines § 19.

34-212. (2497) Drinking water. It shall be the duty of every person conducting or operating a hotel, public inn or lodginghouse to have available at all times in the lobby, office, or other convenient place, an ample supply of drinking water, pure and free from contamination. The source of supply must be far enough removed from privy vaults or other means of contamination to prevent drainage from said vaults to the wells or other source of supply, and the water supply shall be subject to examination by the state board of health and when found unfit for drinking purposes, its use must be discontinued forthwith.

History: En. Sec. 12, Ch. 36, L. 1919;
re-en. Sec. 2497, R. C. M. 1921.

34-213. (2498) Penalty for violations. Each owner, manager, agent, or person in charge of a hotel, or other business mentioned in this act, who violates any provisions of this act shall be deemed guilty of a misdemeanor and shall be fined not less than ten dollars nor more than one hundred dollars, or shall be imprisoned in the county jail for not less than ten days, nor more than three months, or both, and every day that such hotel is carried on in violation of this act shall constitute a separate offense.

History: En. Sec. 13, Ch. 36, L. 1919;
re-en. Sec. 2498, R. C. M. 1921.

34-214. (2499) Cleansing walls before putting on new paper or wall covering. Whenever the paper or substitute wall covering on the ceiling or walls of a room in any dwelling, tenement, or apartment house, or house owned or maintained for rental purposes, has become loosened so as to be in danger of collecting and retaining dust, germs, vermin, or filth, the same shall be removed, and the walls and ceilings thoroughly cleaned before new wallpaper or substitute wall covering shall be put thereon.

History: En. Sec. 1, Ch. 160, L. 1917;
re-en. Sec. 2499, R. C. M. 1921.

Collateral References

Health⇒32.
39 C.J.S. Health § 22.

34-215. (2500) Duty in case of contagious or infectious disease. No wallpaper or substitute wall covering shall be placed upon the walls or ceiling of any room where there has been a case of contagious or infectious disease, until all wallpaper and substitute wall covering thereon has been entirely removed, and the walls and ceiling thoroughly cleansed, oil-painted walls and ceilings excepted.

History: En. Sec. 2, Ch. 160, L. 1917;
re-en. Sec. 2500, R. C. M. 1921.

34-216. (2501) County and city boards of health to enforce act. The county board of health in each county of this state shall have power to examine into the enforcement of this act in any city, town, or elsewhere within its respective county; provided, that in cities or towns where a board of health is established, then such city board of health shall have such power to examine into the enforcement of this act within the boundaries of such city or town.

History: En. Sec. 3, Ch. 160, L. 1917;
re-en. Sec. 2501, R. C. M. 1921.

Collateral References

Health \S 6.
39 C.J.S. Health \S 9.
25 Am. Jur. 314, Health, $\S\S$ 36 et seq.

34-217. (2502) Violation of act a misdemeanor. That any person or persons who violate any of the provisions of this act, or who shall cause any person or persons to violate any section of this act, shall be deemed guilty of a misdemeanor.

History: En. Sec. 4, Ch. 160, L. 1917;
re-en. Sec. 2502, R. C. M. 1921.

Collateral References

Innkeepers \S 15.
43 C.J.S. Innkeepers \S 27.

TITLE 35

HOUSING

- Chapter 1. Housing authorities law, 35-101 to 35-146.
2. Validation proceedings under housing authorities law, 35-201 to 35-203.
3. Additional war powers of housing authorities, 35-301 to 35-307.
4. Emergency war and veterans' housing facilities (35-401 to 35-407 Obsolete), 35-408 to 35-414.

CHAPTER 1

HOUSING AUTHORITIES LAW

- Section 35-101. Short title.
35-102. Finding and declaration of necessity.
35-103. Definitions.
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35-104. Notice, hearing and creation of authority.
35-105. Appointment, qualifications and tenure of commissioners—officers, legal assistance—delegation of power.
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35-110. Co-operation between housing authorities.
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35-112. Acquisition of land for government.
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35-140. Purpose of act.
35-141. Supplemental nature of act.
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- 35-143. Housing bonds legal investments and security.
- 35-144. Act controlling.
- 35-145. Home owners' loan corporation bonds as security for deposit of public funds.
- 35-146. Housing authorities may be dissolved when and how.

35-101. (5309.1) Short title. This act may be referred to as the Housing Authorities Law.

History: En. Sec. 1, Ch. 140, L. 1935.

Appropriations Required

Despite the contention that the city had no money in its treasury "not appropriated to some other purpose" (sec. 35-138) after creation of housing authority under this section et seq., preliminary expenses being a mandatory expenditure "required by law," the city has no discretion in the matter under section 11-1409 authorizing expenditures in cases of emergency, but must estimate the amount necessary and make the appropriation. State ex rel. Helena Housing Authority v. City Council of City of Helena, 108 M 347, 350, 90 P 2d 514.

City Cannot Repudiate Co-operation Contract

After the Helena city council created the Helena housing authority by declaring the need for low-income housing, and then entered into a local co-operation agreement as is required by U. S. C., Tit. 42, § 1415(7) (b) (i) before federal loans are given, the city council could not then pass a valid ordinance repudiating the co-operation agreement to justify a change of mind about the advisability of the project. After the city council created the housing authority and entered into the co-operation agreement, it had completed its discretionary duties, and the supervision and completion of the project passed under the exclusive control of the housing authority. The ordinance assuming to cancel and void the co-operation agreement violates the United States and Montana constitutions which prohibit the passing of laws impairing the obligation of contracts. State ex rel. Helena Housing Authority v. City Council of Helena, 125 M 592, 242 P 2d 250, 251, 253.

Constitutionality of Housing Law

The grant of eminent domain to the housing authorities does not violate either Art. III, Sec. 14 or Art. XV, Sec. 9, of the state constitution, providing for just compensation; being public property, housing properties are exempt from taxation under Art. XII, Sec. 2, Const.; the bonds authorized to be issued by a housing authority are not an indebtedness under Secs. 1, 2, 4 or 6, Art. XIII, Const.; a city making donations is not violating Art. XIII, Sec. 1, Const., the functions being primarily municipal; not class legis-

lation under Art. V, Sec. 26, Const.; and act not contravening Art. V, Sec. 36 as delegating legislative power to the commission. Rutherford v. City of Great Falls, 107 M 512, 86 P 2d 656.

The housing authorities act, contemplating eradication of slums, promoting the general welfare, is for a public rather than a private or local purpose, in the exercise of the state's sovereign police powers, and a city so co-operating functions not in its proprietary but in its governmental capacity, hence the act is not invalid as levying taxes upon the inhabitants of the city for municipal purposes in contravention of Art. XII, Sec. 4 of the state constitution. State ex rel. Helena Housing Authority v. City Council of City of Helena, 108 M 347, 352, 90 P 2d 514.

Construction of State Housing Law

The two acts contained in sections 35-101 to 35-141, which together constitute the state housing law, were passed in the exercise of the state's police powers, the purpose being the eradication of slums and substitution of safe and sanitary dwellings in place thereof, thus falling within the definition of "public purpose" i. e., the promotion of the general welfare, health, safety, morals, security, prosperity, contentment and equality before the law, for which public money may be spent and private property acquired. Rutherford v. City of Great Falls, 107 M 512, 516, 86 P 2d 656.

Montana's housing authority law is the statute that defines the conditions under which a municipality and a state housing authority may negotiate with the federal agency. State ex rel. Helena Housing Authority v. City Council of City of Helena, 125 M 592, 242 P 2d 250, 251.

Mandamus to Compel Zoning Ordinance

To compel a city to pass an ordinance or resolution for the rezoning of the city and vacation of streets by mandamus at the instance of the city housing authority would not destroy the exercise of right of referendum by the city inhabitants, since the housing authorities law is an emergency measure and section 11-1106 specifically provides that an emergency measure is excepted from the provisions of the referendum act. State ex rel. Great Falls Housing Authority v. City of Great Falls, 110 M 318, 331, 100 P 2d 915.

Validity of Contracts with City

A contract between a city and a housing authority under the state housing law, in which the city binds itself to demolish unsanitary dwellings equal in number to dwellings constructed by the authority, etc., and to co-operate generally with the program was not invalid as constituting

an attempt by the city to bind itself in its exercise of governmental functions. *Rutherford v. City of Great Falls*, 107 M 512, 523, 86 P 2d 656.

Collateral References

Health \Rightarrow 32.

39 C.J.S. Health § 22.

35-102. (5309.2) Finding and declaration of necessity. It is hereby declared that unsanitary or unsafe dwelling accommodations exist in urban and rural areas throughout the state and that such unsafe or unsanitary conditions arise from overcrowding and concentration of population, the obsolete and poor conditions of buildings, improper planning, excessive land coverage, lack of proper light, air and space, unsanitary design and arrangement, lack of proper sanitary facilities, and the existence of conditions which endanger life or property by fire and other causes; that in such urban and rural areas many persons of low income are forced to reside in unsanitary or unsafe dwelling accommodations; that in such urban and rural areas there is a lack of safe or sanitary dwelling accommodations available to all the inhabitants thereof and that consequently many persons of low income are forced to occupy overcrowded and congested dwelling accommodations; that these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the citizens of the state and impair economic values; that these conditions cannot be remedied by the ordinary operations of private enterprises; that the clearance, replanning and reconstruction of the areas in which unsanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which public money may be spent and private property acquired; that it is in the public interest that work on such projects be instituted as soon as possible; and that the necessity for the provisions hereinafter enacted is hereby declared as a matter of legislative determination to be in the public interest.

History: En. Sec. 2, Ch. 140, L. 1935; amd. Sec. 1, Ch. 153, L. 1941.

Legislative Finding of Public Necessity Upheld

The legislature having determined and declared by this section the necessity in the public interest for provisions for slum clearance and that such is a public pur-

pose, the court will not interfere with such finding in the absence of a clear showing that such determination was wrong. *Rutherford v. City of Great Falls*, 107 M 512, 516, 86 P 2d 656.

Collateral References

Statutes \Rightarrow 179.

81 C.J.S. Statutes § 315.

35-103. (5309.3) Definitions. The following terms, wherever used or referred to in this act shall have the following respective meanings, unless a different meaning clearly appears from the context:

(1) "Authority" or "Housing Authority" shall mean a public body and a body corporate and politic organized in accordance with the provisions of this act for the purposes, with the powers and subject to the restrictions hereinafter set forth.

(2) "City" shall mean any city which is, or is about to be, included in the territorial boundaries of an authority when created hereunder.

(3) "Council" shall mean the legislative body, council, board of commissioners, board of trustees, or other body charged with governing the city.

(4) "City clerk" and "mayor" shall mean the clerk and mayor, respectively, of the city or the officers thereof charged with the duties customarily imposed on the clerk and mayor respectively.

(5) "Municipality" shall mean any city, town or incorporated village, which is located within the territorial boundaries of an authority.

(6) "Commissioner" shall mean one of the members of an authority appointed in accordance with the provisions of this act.

(7) "Government" shall include the state and federal governments and any subdivision, agency or instrumentality, corporate or otherwise, of either of them.

(8) "State" shall mean the state of Montana.

(9) "Federal government" shall include the United States of America, the federal emergency administration of public works or any agency, instrumentality, corporate or otherwise, of the United States of America.

(10) "Housing project" shall include all real and personal property, buildings and improvements, stores, offices, lands for farming and gardening, and community facilities acquired or constructed or to be acquired or constructed pursuant to a single plan or undertaking (a) to demolish, clear, remove, alter or repair unsanitary or unsafe housing, and/or (b) to provide safe and sanitary dwelling accommodations for persons of low income. The term "housing project" may also be applied to the planning of the buildings and improvements, the acquisition of property, the demolition of existing structures, the construction, reconstruction, alteration and repair of the improvements and all other work in connection therewith.

(11) "Community facilities" shall include real and personal property, and buildings and equipment for recreational or social assemblies, for educational, health or welfare purposes and necessary utilities, when designed primarily for the benefit and use of the housing authority and/or the occupants of the dwelling accommodations.

(12) "Bonds" shall mean any bonds, interim certificates, notes, debentures, or other obligations of the authority issued pursuant to this act.

(13) "Mortgage" shall include deeds of trust, mortgage, building and loan contracts or other instruments conveying real or personal property as security for bonds and conferring a right to foreclose and cause a sale thereof.

(14) "Trust indenture" shall include instruments pledging the revenues of real or personal properties but not conveying such properties or conferring a right to foreclose and cause a sale thereof.

(15) "Contract" shall mean any agreement of an authority with or for the benefit of an obligee whether contained in a resolution, trust indenture, mortgage, lease, bond or other instrument.

(16) "Real property" shall include lands, lands under water, structures, and any and all easements, franchises and incorporeal hereditaments and every estate and right therein, legal and equitable, including terms for years and liens by way of judgment, mortgage or otherwise.

(17) "Obligee of the authority" or "obligee" shall include any bondholder, trustee or trustees for any bondholders, any lessor demising property to the authority used in connection with a housing project or any assignee or assignees of such lessor's interest or any part thereof, and the United States of America, when it is a party to any contract with the authority.

(18) "Persons of low income" shall mean persons or families who lack the amount of income which is necessary (as determined by the authority undertaking the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

(19) "Elderly families" shall mean families the head of which (or his spouse) is sixty-five years of age or over and who otherwise qualify as "persons of low income" within the meaning of the definition set forth in (18) above.

History: En. Sec. 3, Ch. 140, L. 1935; amd. Sec. 1, Ch. 193, L. 1957.

References

State ex rel. Helena Housing Authority v. City of Helena, 108 M 347, 355, 90 P 2d 514.

Collateral References

Constitutionality, construction, and application of statutes or governmental projects for improvement of housing conditions (slum clearance). 105 ALR 911.

35-103.1. Low-rent housing for elderly families. For the purpose of increasing the supply of low-rent housing for elderly families, an authority may develop, construct and operate new housing or acquire, remodel and operate existing housing in order to provide accommodations designed specifically for such elderly families; provided, that any application of the authority for federal financial assistance for such housing for elderly families shall first be approved by the council by resolution duly adopted. Notwithstanding the provisions of this or any other law, an authority, in respect to dwelling units suitable to the needs of elderly families, may extend a prior preference in occupancy to such elderly families; provided, that an authority may agree to conditions as to tenant eligibility or preference required by the federal government pursuant to federal law in any contract for financial assistance with the authority.

History: En. 35-103.1 by Sec. 2, Ch. 193, L. 1957.

35-104. (5309.4) Notice, hearing and creation of authority. Any twenty-five (25) residents of a city and of the area within ten (10) miles from the territorial boundaries thereof may file a petition with the city clerk setting forth that there is a need for an authority to function in the city and said surrounding area. Upon the filing of such a petition the city clerk shall give notice of the time, place and purposes of a public hearing at which the council will determine the need for an authority in the city and said surrounding area. Such notice shall be given at the city's expense by publishing a notice, at least ten (10) days preceding the day on which the hearing is to be held, in a newspaper having a general circulation in the city and said surrounding area or, if there be no such newspaper, by posting such a notice in at least three (3) public places within

the city, at least ten (10) days preceding the day on which the hearing is to be held.

Upon the date fixed for said hearing held upon notice as provided herein, an opportunity to be heard shall be granted to all residents and taxpayers of the city and said surrounding area and to all other interested persons. After such a hearing, the council shall determine:

(1) Whether unsanitary or unsafe inhabited dwelling accommodations exist in the city and said surrounding area, and/or

(2) Whether there is a lack of safe or sanitary dwelling accommodations in the city and said surrounding area available for all the inhabitants thereof.

In determining whether dwelling accommodations are unsafe or unsanitary, the council shall take into consideration the following: the physical condition and age of the buildings; the degree of overcrowding; the percentage of land coverage; the light and air available to the inhabitants of such dwelling accommodations; the size and arrangement of the rooms; the sanitary facilities; and the extent to which conditions exist in such buildings which endanger life or property by fire or other causes.

If it shall determine that either or both of the above enumerated conditions exist, the council must draft an ordinance authorizing the mayor to appoint five (5) commissioners to act as an authority, which said ordinance shall not be effective until it has been approved by a majority vote of the electors within the city limits voting, either at a special or general election. Said commission shall be a public body and a body corporate and politic upon the completion of the taking of the following proceedings:

The commissioners shall present to the secretary of the state an application signed by them, which shall set forth (without any detail other than the mere recital) (1) that a notice has been given and public hearing has been held as aforesaid, that the council made the aforesaid determination after such hearing, and that the mayor has appointed them as commissioners; (2) the name, and official residence of each of the commissioners, together with a certified copy of the appointment evidencing their right to office, the date and place of induction into and taking oath of office, and that they desire the housing authority to become a public body and a body corporate and politic under this act; (3) the term of office of each of the commissioners; (4) the name which is proposed for the corporation; and (5) the location of the principal office of the proposed corporation. The application shall be subscribed and sworn to by each of said commissioners before an officer authorized by the laws of the state to take and certify oaths, who shall certify upon the application that he personally knows the commissioners and knows them to be the officers as asserted in the application, and that each subscribed and swore thereto in the officer's presence. The secretary of state shall examine the application and if he finds that the name proposed for the corporation is not identical with that of a person or of any other corporation of this state or so nearly similar as to lead to confusion and uncertainty he shall receive and file it and shall record it in an appropriate book of record in his office.

When the application has been made, filed and recorded, as herein provided, the authority shall constitute a public body and a body corporate and politic under the name proposed in the application; the secretary of state shall make and issue to the said commissioners, a certificate of incorporation pursuant to this act, under the seal of the state, and shall record the same with the application.

The boundaries of such authority shall include said city and the area within ten (10) miles from the territorial boundaries of said city but in no event shall it include the whole or a part of any other city unless a resolution shall have been adopted by the governing body of such other city declaring that there is a need for such authority to exercise its powers within that city. In case an area lies within ten (10) miles of the boundaries of more than one city, such area shall be deemed to be within the boundaries of the authority embracing such area which was first established, all priorities to be determined on the basis of the time of the issuance of the aforesaid certificates by the secretary of state. No housing authority shall operate in any area in which an authority already established is operating without the consent by resolution of the authority already operating therein. After the creation of an authority, the subsequent existence within its territorial boundaries of more than one city shall in no way affect the territorial boundaries of such authority.

If the council, after a hearing as aforesaid, shall determine that neither of the above enumerated conditions exist, it shall adopt a resolution denying the petition. After three (3) months shall have expired from the date of the denial of any such petition, subsequent petitions may be filed as aforesaid and new hearings and determinations made thereon.

In any suit, action or proceedings involving the validity or enforcement of, or relating to any contract of the authority, the authority shall be conclusively deemed to have been established in accordance with the provisions of this act upon proof of the issuance of the aforesaid certificate by the secretary of state. A copy of such certificate, duly certified by the secretary of state shall be admissible in evidence in any such suit, action or proceeding, and shall be conclusive proof of the filing and contents thereof.

History: En. Sec. 4, Ch. 140, L. 1935; amd. Sec. 1, Ch. 68, L. 1953; amd. Sec. 3, Ch. 193, L. 1957.

Controlling over Prior Statute

It is not necessary that the city council pass upon a resolution authorizing expenditures to meet an emergency by unanimous vote as required by section 11-1409, in the matter of authorizing the creation of a city housing authority under section 35-101 et seq., since this section, a part of the housing authorities law, later in point of time and not requiring a unanimous vote, is controlling. *State ex rel. Helena Housing Authority v. City of Helena*, 108 M 347, 351, 90 P 2d 514.

Mandamus to Compel Completion

After a city council regularly created a housing authority, any act required of that body to bring the project to completion was purely a ministerial act, and mandamus therefore could properly issue to compel the council to take the necessary steps to vacate and rezone the land selected by the authority for the project. *State ex rel. Great Falls Housing Authority v. City of Great Falls*, 110 M 318, 332, 100 P 2d 915.

Collateral References

Municipal Corporations ¶175.
62 C.J.S. *Municipal Corporations* § 672.
42 Am. Jur. 779, *Public Housing Laws*.

35-105. (5309.5) Appointment, qualifications and tenure of commissioners—officers, legal assistance—delegation of power. An authority shall consist of five commissioners appointed by the mayor and he shall designate the first chairman. No commissioner may be a city official.

The commissioners who are first appointed shall be designated by the mayor to serve for terms of one, two, three, four and five years respectively from the date of their appointment. Thereafter, the term of office shall be five years. A commissioner shall hold office until his successor has been appointed and has qualified. Vacancies shall be filled for the unexpired term. Three commissioners shall constitute a quorum. The mayor shall file with the city clerk a certificate of the appointment or reappointment of any commissioner and such certificate shall be conclusive evidence of the due and proper appointment of such commissioner. A commissioner shall receive no compensation for his services but he shall be entitled to the necessary expenses including traveling expenses incurred in the discharge of his duties.

When the office of the first chairman of the authority becomes vacant, the authority shall select a chairman from among its members. An authority shall select from among its members a vice-chairman, and it may employ a secretary (who shall be executive director), technical experts and such other officers, agents and employees, permanent and temporary, as it may require, and shall determine their qualifications, duties and compensation. An authority may call upon the corporation counsel or chief law officer of the city for such legal services as it may require or it may employ its own counsel and legal staff. An authority may delegate to one or more of its agents or employees such powers or duties as it may deem proper.

History: En. Sec. 5, Ch. 140, L. 1935.

Collateral References

Municipal Corporations 192.

62 C.J.S. Municipal Corporations §§ 673-675.

35-106. (5309.6) Duty of the authority and commissioners of the authority. The authority and its commissioners shall be under a statutory duty to comply or to cause compliance strictly with all provisions of this act and the laws of the state and in addition thereto, with each and every term, provision and covenant in any contract of the authority on its part to be kept or performed.

History: En. Sec. 6, Ch. 140, L. 1935.

Collateral References

Municipal Corporations 192.

62 C.J.S. Municipal Corporations § 676.

35-107. (5309.7) Interested commissioners or employees. No commissioner or employee of an authority shall acquire any interest direct or indirect in any housing project or in any property included or planned to be included in any project, nor shall he have any interest direct or indirect in any contract or proposed contract for materials or services to be furnished or used in connection with any housing project. If any commissioner or employee of an authority owns or controls an interest direct or indirect in any property included or planned to be included in any housing project, he shall immediately disclose the same in writing to the authority

and such disclosure shall be entered upon the minutes of the authority. Failure to so disclose such interest shall constitute misconduct in office.

History: En. Sec. 7, Ch. 140, L. 1935.

Collateral References

Municipal Corporations 192.

62 C.J.S. Municipal Corporations § 676.

35-108. (5309.8) Removal of commissioners. The mayor may remove a commissioner for inefficiency or neglect of duty or misconduct in office, but only after the commissioner shall have been given a copy of the charges against him (which may be made by the mayor) at least ten (10) days prior to the hearing thereon and had an opportunity to be heard in person or by counsel.

Any obligee of the authority may file with the mayor written charges that the authority is violating willfully any law of the state or any term, provision or covenant in any contract to which the authority is a party. The mayor shall give each of the commissioners a copy of such charges at least ten (10) days prior to the hearing thereon and an opportunity to be heard in person or by counsel and shall within fifteen days after receipt of such charges remove any commissioners of the authority who shall have been found to have acquiesced in any such willful violation.

A commissioner shall be deemed to have acquiesced in a willful violation by the authority of a law of this state or of any term, provision or covenant contained in a contract to which the authority is a party, if, before a hearing is held on the charges against him, he shall not have filed a written statement with the authority of his objections to, or lack of participation in such violation.

In the event of the removal of any commissioner, the mayor shall file in the office of the city clerk a record of the proceedings together with the charges made against the commissioners and the findings thereon.

History: En. Sec. 8, Ch. 140, L. 1935.

Collateral References

Municipal Corporations 192.

62 C.J.S. Municipal Corporations § 674

35-109. (5309.9) Powers of authority. An authority shall constitute a public body and a body corporate and politic, exercising public powers, and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this act, including the following powers in addition to others herein granted:

To investigate into living, dwelling and housing conditions and into the means and methods of improving such conditions; to determine where unsafe, or unsanitary dwelling or housing conditions exist; to study and make recommendations concerning the plan of any city or municipality located within its boundaries in relation to the problem of clearing, replanning and reconstruction of areas in which unsafe, or unsanitary dwelling or housing conditions exist, and the providing of dwelling accommodations for persons of low income, and to co-operate with any city, municipal or regional planning agency; to prepare, carry out and operate housing projects; to provide for the construction, reconstruction, improvement, alteration or repair of any housing project or any part thereof; to take over by purchase, lease or otherwise any housing project located within its bound-

aries undertaken by any government; to act as agent for the federal government in connection with the acquisition, construction, operation and/or management of a housing project or any part thereof; to arrange with any city or municipality located in whole or in part within its boundaries or with a government for the furnishing, planning, replanning, installing, opening or closing of streets, options or property rights or for the furnishing of property or services in connection with a project;

To arrange with the state, its subdivision and agencies, and any county, city or municipality of the state, to the extent that it is within the scope of each of their respective functions, (a) to cause the services customarily provided by each of them to be rendered for the benefit of such housing authority and/or the occupants of any housing projects and (b) to provide and maintain parks and sewage, water and other facilities adjacent to or in connection with housing projects and (c) to change the city or municipality map, to plan, replan, zone or rezone any part of the city or municipality; to lease or rent any of the dwelling or other accommodations or any of the lands, buildings, structures or facilities embraced in any housing project and to establish and revise the rents or charges therefor; to enter upon any building or property in order to conduct investigations or to make surveys or soundings; to purchase, lease, obtain options upon, acquire by gift, grant, bequest, devise, or otherwise any property real or personal or any interest therein from any person, firm, corporation, city, municipality, or government;

To acquire by eminent domain any real property, including improvements and fixtures thereon; to sell, exchange, transfer, assign, or pledge any property real or personal or any interest therein to any person, firm, corporation, municipality, city, or government; to own, hold, clear and improve property, to insure or provide for the insurance of the property or operations of the authority against such risks as the authority may deem advisable; to procure insurance or guarantees from a federal government of the payment of any debts or parts thereof secured by mortgages made or held by the authority on any property included in any housing project;

To borrow money upon its bonds, notes, debentures or other evidences of indebtedness and to secure the same by pledges of its revenues, and (subject to the limitations hereinafter imposed) by mortgages upon property held or to be held by it, or in any other manner; in connection with any loan, to agree to limitations upon its right to dispose of any housing project or part thereof or to undertake additional housing projects; in connection with any loan by a government, to agree to limitations upon the exercise of any powers conferred upon the authority by this act; to invest any funds held in reserves or sinking funds, or any funds not required for immediate disbursement, in property or securities in which savings banks may legally invest funds subject to their control;

To sue and be sued; to have a seal and to alter the same at pleasure; to have perpetual succession; to make and execute contracts and other instruments necessary or convenient to the exercise of the powers of the authority to make and from time to time amend and repeal bylaws, rules and regulations not inconsistent with this act, to carry into effect the powers and purposes of the authority;

To conduct examinations and investigations and to hear testimony and take proof under oath at public or private hearings on any matter material for its information;

To issue subpoenas requiring the attendance of witnesses or the production of books and papers and to issue commissions for the examination of witnesses who are out of the state or unable to attend before the authority, or excused from attendance; and to make available to such agencies, boards or commissions as are charged with the duty of abating or requiring the correction of nuisances or like conditions, or of demolishing unsafe or unsanitary structures within its territorial limits, its findings and recommendations with regard to any building or property where conditions exist which are dangerous to the public health, morals, safety or welfare.

Any of the investigations or examinations provided for in this act may be conducted by the authority or by a committee appointed by it, consisting of one or more commissioners, or by counsel, or by an officer or employee specially authorized by the authority to conduct it. Any commissioner, counsel for the authority, or any person designated by it to conduct an investigation or examination shall have power to administer oaths, take affidavits and issue subpoenas or commissions.

An authority may exercise any or all of the powers herein conferred upon it, either generally or with respect to any specific housing project or projects, through or by an agent or agents which it may designate, including any corporation or corporations which are or shall be formed under the laws of this state, and for such purposes an authority may cause one or more corporations to be formed under the laws of this state or may acquire the capital stock of any corporation or corporations.

Any corporate agent, all of the stock of which shall be owned by the authority or its nominee or nominees, may to the extent permitted by law exercise any of the powers conferred upon the authority herein. In addition to all of the other powers herein conferred upon it, an authority may do all things necessary and convenient to carry out the powers expressly given in this act. No provisions with respect to the acquisition, operation or disposition of property by other public bodies shall be applicable to an authority unless the legislature shall specifically so state.

Before any housing projects or additional units to existing housing projects shall be undertaken by an authority or a contract with the federal government shall be executed therefor, the city or town council must pass an ordinance authorizing the same, and said ordinance shall not be effective until it has been approved by a majority vote of the electors within the corporate limits of such city or town voting either at a special or general election. Provided, however, that provisions on elections herein contained shall not be applicable to repair, maintenance, painting or remodeling of existing units nor to applications on file with the public housing administration on the effective date of this act.

History: En. Sec. 9, Ch. 140, L. 1935; amd. Sec. 2, Ch. 68, L. 1953; amd. Sec. 4, Ch. 193, L. 1957.

Contract with City for Slum Clearance

A contract between a city and a housing authority whereby the city agreed to eliminate unsafe and unsanitary dwellings

in the city to an extent at least equal to the number of new dwelling units to be erected by the authority and to co-operate generally in the program of the authority was valid. *Rutherford v. City of Great Falls*, 107 M 512, 523, 86 P 2d 656.

Collateral References

Suability and liability of public housing authority for torts. 61 ALR 2d 1246.

35-110. (5309.10) Co-operation between housing authorities. Any two (2) or more housing authorities may join or co-operate with one another in the exercise of any or all of the powers conferred on such housing authorities for the purpose of financing, planning, undertaking, constructing or operating a housing project or projects located within the area of operation of any one or more of such housing authorities.

History: En. Sec. 10, Ch. 140, L. 1935; amd. Sec. 2, Ch. 153, L. 1941.

35-111. (5309.11) Eminent domain. The authority shall have the right to acquire by eminent domain any real property, including fixtures and improvements, which it may deem necessary to carry out the purposes of this act after the adoption by it of a resolution declaring that the acquisition of the property described therein is in the public interest and necessary for public use. The authority may exercise the power of eminent domain pursuant to the provisions of either: (a) sections 93-9901 to 93-9926, both inclusive; or (b) pursuant to any other applicable statutory provisions for the exercise of the power of eminent domain.

Property already devoted to a public use may be acquired, provided that no property belonging to any city or municipality within the boundaries of the authority or to any government may be acquired without its consent and that no property belonging to a public utility corporation may be acquired without the approval of the commission or other officer or tribunal, if any there be, having regulatory power over such corporation.

History: En. Sec. 11, Ch. 140, L. 1935.

Constitutionality

Housing projects to be carried out by housing authority under this act being devoted to a public purpose, the grant of power of eminent domain is constitutional. *Rutherford v. City of Great Falls*, 107 M 512, 517, 86 P 2d 656.

the provision of Art. V, Sec. 39, Const. prohibiting the release of any obligation held by the state or municipal corporation except by payment into the proper treasury, so long as the county obtained the fair market value of the property. *Housing Authority of City of Butte v. Bjork and County of Silver Bow*, 109 M 552, 555, 98 P 2d 324.

Tax Lien Extinguished for Appraised Value

Where a city housing authority by eminent domain acquired a city lot upon which delinquent taxes were due and its appraised value was turned over by the authority to the county, extinguishment of the county's lien did not offend against

Collateral References

Deduction of benefits in determining compensation or damages in eminent domain. 145 ALR 7.

Increment to value, from projects for which land is condemned, as a factor in fixing compensation. 147 ALR 66.

35-112. (5309.12) Acquisition of land for government. The authority may acquire by purchase or by the exercise of its power of eminent domain as aforesaid, any property real or personal for any housing project being constructed or operated by a government. The authority upon such terms and conditions, with or without consideration, as it shall determine, may convey title or deliver possession of such property so acquired or purchased to such government for use in connection with such housing project.

History: En. Sec. 12, Ch. 140, L. 1935.

29 C.J.S. Eminent Domain § 64; 63 C.J.S. Municipal Corporations § 959.

Collateral References

Eminent Domain—17; Municipal Corporations—223.

35-113. (5309.13) Zoning and building laws. All housing projects of an authority shall be subject to the planning, zoning, sanitary and building laws, ordinances and regulations applicable to the locality in which the housing project is situated.

History: En. Sec. 13, Ch. 140, L. 1935.

General Ordinances Will Not Apply to Defeat Purpose of Housing Act

Application of General Municipal Laws

After a city council has authorized a housing authority, the general municipal laws relating thereto must be applied only when they will not defeat the purpose of the housing act, and all things thereafter done pass under the exclusive control of the provisions of the act; after the city has entered into a transaction of a contractual nature with its housing authority with relation to vacating streets and rezoning land selected for the project, it cannot thereafter repudiate it irrespective of change of personnel of the city council. State ex rel. Great Falls Housing Authority v. City of Great Falls, 110 M 318, 326, 100 P 2d 915.

This section, declaring that housing projects shall be subject to the planning, zoning, sanitary and building laws applicable to the locality in which the project is situated, when construed with section 35-127, means that the general municipal laws relating thereto must be applied only when they will not defeat the purpose of the housing act. State ex rel. Great Falls Housing Authority v. City of Great Falls, 110 M 318, 331, 100 P 2d 915.

Collateral References

Municipal Corporations—601.
62 C.J.S. Municipal Corporations § 224.

35-114. (5309.14) Types of bonds. The authority shall have power and is hereby authorized from time to time in its discretion to issue for any of its corporate purposes:

(a) Bonds on which the principal and interest are payable

(1) exclusively from the income and revenues of the housing project financed with the proceeds of such bonds or with such proceeds together with the proceeds of a grant from the federal government to aid in financing the construction thereof, or

(2) exclusively from the income and revenues of certain designated housing projects whether or not they were financed in whole or in part with the proceeds of such bonds;

provided, however, that the credit of the authority shall not be pledged to the payment of such bonds, but such bonds shall be payable only (and the bonds shall so state on their face) from the revenues of the designated housing project or projects and the funds received from the sale or disposal thereof and, if the authority so determines, shall be additionally secured by a trust indenture pledging such revenues or, in certain instances as hereinafter provided, by a mortgage of the property comprising such designated housing project or projects and the revenue therefrom.

(b) Bonds for the payment of the principal and interest of which the credit of the authority is pledged and which may be additionally secured by a pledge of the revenues of the authority or any part thereof pursuant to a resolution or trust indenture of the authority or, in certain instances as hereinafter provided, may be additionally secured by a mortgage of the property and revenues of the authority or any part thereof.

Neither the commissioners of the authority nor any person executing the bonds shall be liable personally on the bonds by reason of the issuance thereof.

The bonds and other obligations of the authority (and such bonds and obligations shall so state on their face) shall not be a debt of any city or municipality located within its boundaries or of the state and neither the state nor any such city or municipality shall be liable thereon, nor in any event shall they be payable out of any funds or properties other than those of the authority. The bonds shall not constitute an indebtedness within the meaning of any constitutional or statutory provision of the laws of the state. Bonds may be issued under this act notwithstanding any debt or other limitation prescribed by any statute.

History: En. Sec. 14, Ch. 140, L. 1935.

Constitutional Debt Limitations

Under the provisions of subdivision (b) of this section, housing authority bonds are not an indebtedness of a city, municipality or the state and they do not contravene the limitations of Sections 1, 2, 4 or 6 of Article XIII of the Constitution. *Rutherford v. City of Great Falls*, 107 M 512, 519, 86 P 2d 656.

Collateral References

Municipal Corporations ~~§~~864(1), 910.
64 C.J.S. Municipal Corporations §§ 1850,
1905 et seq., 4147 et seq.

Exemption of property or bonds of housing authority from taxation, 133 ALR 365.

35-115. (5309.15) Form and sale of bonds. The bonds of the authority shall be authorized by its resolution and shall be issued in one or more series and shall bear such date or dates, mature at such time or times, not exceeding sixty (60) years from their respective dates, bear interest at such rate or rates, not exceeding six per centum (6%) per annum payable semiannually, be in such denominations (which may be made interchangeable) be in such form, either coupon or registered, carry such registration privileges, be executed in such manner, be payable in such medium of payment, at such place or places, and be subject to such terms of redemption (with or without premium) as such resolution or its trust indenture or mortgage may provide.

The bonds may be sold at public sale held after notice published once at least ten days prior to such sale in a newspaper having a general circulation in the city and in a financial newspaper published in the city of or in the city of provided, however, that such bonds may be sold to the federal government at private sale without any public advertisement. The bonds may be sold at such price or prices as the authority shall determine provided that the interest cost to maturity of the money received for any issue of said bonds shall not exceed six per centum (6%) per annum.

Pending the authorization, preparation, execution or delivery of definitive bonds, the authority may issue interim certificates, or other temporary obligations to the purchaser of such bonds. Such interim certificates, or other temporary obligations, shall be in such form, contain such terms, conditions and provisions, bear such date or dates, and evidence such agreements relating to their discharge or payment or the delivery of definitive bonds as the authority may by resolution, trust indenture or mortgage determine.

In case any of the officers whose signatures appear on any bonds or coupons shall cease to be such officers before the delivery of such bonds, such signatures shall, nevertheless, be valid and sufficient for all purposes, the same as if they had remained in office until such delivery.

The authority shall have power out of any funds available therefor to purchase any bonds issued by it at a price not more than the principal amount thereof and the accrued interest; provided, however, that bonds payable exclusively from the revenues of a designated project or projects shall be purchased out of any such revenues available therefor. All bonds so purchased shall be canceled. This paragraph shall not apply to the redemption of bonds.

Any provision of any law to the contrary notwithstanding, any bonds, interim certificates, or other obligations issued pursuant to this act shall be fully negotiable.

History: En. Sec. 15, Ch. 140, L. 1935.

Collateral References

Municipal Corporations \S 921(1).

64 C.J.S. Municipal Corporations \S 1930.

35-116. (5309.16) Provisions of bonds—trust indentures and mortgages. In connection with the issuance of bonds and/or the incurring of any obligation under a lease and in order to secure the payment of such bonds and/or obligations, the authority shall have power:

(1) To pledge by resolution, trust indenture, mortgage (subject to the limitations hereinafter imposed), or other contract all or any part of its rents, fees, or revenues.

(2) To covenant against mortgaging all or any part of its property, real or personal, then owned or thereafter acquired, or against permitting or suffering any lien thereon.

(3) To covenant with respect to limitations on its right to sell, lease or otherwise dispose of any housing project or any part thereof, or with respect to limitations on its right to undertake additional housing projects.

(4) To covenant against pledging all or any part of its rents, fees and revenues to which its right then exists or the right to which may thereafter come into existence or against permitting or suffering any lien thereon.

(5) To provide for the release of property, rents, fees, and revenues from any pledge or mortgage, and to reserve rights and powers in, or the right to dispose of, property which is subject to a pledge or mortgage.

(6) To covenant as to the bonds to be issued pursuant to any resolution, trust indenture, mortgage or other instrument and as to the issuance of such bonds in escrow or otherwise, and as to the use and disposition of the proceeds thereof.

(7) To covenant as to what other, or additional debt may be incurred by it.

(8) To provide for the terms, form, registration, exchange, execution and authentication of bonds.

(9) To provide for the replacement of lost, destroyed or mutilated bonds.

(10) To covenant that the authority warrants the title to the premises,

(11) To covenant as to the rents and fees and to be charged, the amount (calculated as may be determined) to be raised each year or other period of time by rents, fees, and other revenues and as to the use and disposition to be made thereof.

(12) To covenant as to the use of any or all of its property, real or personal.

(13) To create or to authorize the creation of special funds in which there shall be segregated (a) the proceeds of any loan and/or grant; (b) all of the rents, fees and revenues of any housing project or projects or parts thereof; (c) any moneys held for the payment of the costs of operation and maintenance of any such housing projects or as a reserve for the meeting of contingencies in the operation and maintenance thereof; (d) any moneys held for the payment of the principal and interest on its bonds or the sums due under its leases and/or as a reserve for such payments; and (e) any moneys held for any other reserves or contingencies; and to covenant as to the use and disposal of the moneys held in such funds.

(14) To redeem the bonds, and to covenant for their redemption and to provide the terms and conditions thereof.

(15) To covenant against extending the time for the payment of its bonds or interest thereon, directly or indirectly, by any means or in any manner.

(16) To prescribe the procedure, if any, by which the terms of any contract with bondholders may be amended or abrogated, the amount of bonds, the holders of which must consent thereto and the manner in which such consent may be given.

(17) To covenant as to the maintenance of its property, the replacement thereof, the insurance to be carried thereon and the use and disposition of insurance moneys.

(18) To vest in an obligee of the authority the right, in the event of the failure of the authority to observe or perform any covenant on its part to be kept or performed, to cure any such default and to advance any moneys necessary for such purpose, and the moneys so advanced may be made an additional obligation of the authority with such interest, security and priority as may be provided in any trust indenture, mortgage, lease or contract of the authority with reference thereto.

(19) To covenant and prescribe as to the events of default and terms and conditions upon which any or all of its bonds shall become or may be declared due before maturity and as to the terms and conditions upon which such declaration and its consequences may be waived.

(20) To covenant as to the rights, liabilities, powers and duties arising upon the breach by it of any covenant, condition, or obligation.

(21) To covenant to surrender possession of all or any part of any part of any housing project or projects upon the happening of an event of default (as defined in the contract) and to vest in an obligee the right without judicial proceedings to take possession and to use, operate, manage and control such housing projects or any part thereof, and to collect and receive all rents, fees and revenues arising therefrom in the same manner

as the authority itself might do and to dispose of the moneys collected in accordance with the agreement of the authority with such obligee.

(22) To vest in a trustee or trustees the right to enforce any covenant made to secure, to pay, or in relation to the bonds, to provide for the powers and duties of such trustee or trustees, to limit liabilities thereof and to provide the terms and conditions upon which the trustee or trustees or the holders of bonds or any proportion of them may enforce any such covenant.

(23) To make covenants other than in addition to the covenants herein expressly authorized, of like or different character.

(24) To execute all instruments necessary or convenient in the exercise of the powers herein granted or in the performance of its covenants or duties, which may contain such covenants and provisions, in addition to those above specified as the government or any purchaser of the bonds of the authority may reasonably require.

(25) To make such covenants and to do any and all such acts and things as may be necessary or convenient or desirable in order to secure its bonds, or in the absolute discretion of the authority tend to make the bonds more marketable; notwithstanding that such covenants, acts or things may not be enumerated herein; it being the intention hereof to give the authority power to do all things in the issuance of bonds, in the provisions for their security that are not inconsistent with the constitution of the state and no consent or approval of any judge or court shall be required thereof; provided, however, that the authority shall have no power to mortgage all or any part of its property, real or personal, except as provided in section 35-117.

History: En. Sec. 16, Ch. 140, L. 1935.

Collateral References

Municipal Corporations—923.

64 C.J.S. Municipal Corporations § 1935.

35-117. (5309.17) Power to mortgage when project financed with aid of a government. In connection with any project financed in whole or in part by a government, the authority shall also have power to mortgage all or any part of its property, real or personal, then owned or thereafter acquired, and thereby:

(a) To vest in a government the right, upon the happening of an event of default (as defined in such mortgage), to foreclose such mortgage through judicial proceedings or through the exercise of a power of sale without judicial proceedings so long as a government shall be the holder of any of the bonds secured by such mortgage.

(b) To vest in a trustee or trustees the right, upon the happening of an event of default (as defined in such mortgage), to foreclose such mortgage through judicial proceedings or through the exercise of a power of sale without judicial proceedings, but only with the consent of the government which aided in financing the housing project involved.

(c) To vest in other obligees the right to foreclose such mortgage by judicial proceedings, but only with the consent of the government which aided in financing the project involved.

(d) To vest in an obligee, including a government, the right in foreclosing any mortgage as aforesaid, to foreclose such mortgage as to all or such part or parts of the property covered thereby as such obligee (in its absolute discretion) shall elect; the institution, prosecution and conclusion of any such foreclosure proceedings and/or the sale of any such parts of the mortgaged property shall not affect in any manner or to any extent the lien of the mortgage on the parts of the mortgaged property not included in such proceedings or not sold as aforesaid.

History: En. Sec. 17, Ch. 140, L. 1935.

Collateral References

Municipal Corporations 225(1).
63 C.J.S. Municipal Corporations § 963
et seq.

35-118. (5309.18) Remedies of an obligee of authority. An obligee of the authority shall have the right in addition to all other rights which may be conferred on such obligee subject only to any contractual restrictions binding upon such obligee:

(a) By mandamus, suit, action or proceeding in law or equity (all of which may be joined in one action) to compel the authority, and the commissioners, officers, agents or employees thereof to perform each and every term, provision and covenant contained in any contract of the authority, and to require the carrying out of any or all covenants and agreements of the authority and the fulfillment of all duties imposed upon the authority by this act.

(b) By suit, action or proceeding in equity to enjoin any acts or things which may be unlawful, or the violation of any of the rights of such obligee of the authority.

(c) By suit, action or proceeding in any court of competent jurisdiction to cause possession of any housing project or any part thereof to be surrendered to any obligee having the right to such possession pursuant to any contract of the authority.

History: En. Sec. 18, Ch. 140, L. 1935.

Collateral References

Foreible Entry and Detainer 7; Injunctions 102; Mandamus 84.

36 C.J.S. Foreible Entry and Detainer § 3; 43 C.J.S. Injunctions § 150; 55 C.J.S. Mandamus § 169.

35-119. (5309.19) Additional remedies conferrable by mortgage or trust indenture. Any authority shall have power by its trust indenture, mortgage, lease or other contract to confer upon any obligee holding or representing a specified amount in bonds, lease or other obligations, the right upon the happening of an "event of default" as defined in such instrument:

(a) By suit, action or proceeding in any court of competent jurisdiction to obtain the appointment of a receiver of any housing project of the authority or any part or parts thereof. If such receiver be appointed, he may enter and take possession of such housing project or any part or parts thereof and operate and maintain same, and collect and receive all fees, rents, revenues, or other charges thereafter arising therefrom in the same manner as the authority itself might do and shall keep such moneys in a

separate account or accounts and apply the same in accordance with the obligations of the authority as the court shall direct.

(b) By suit, action or proceeding in any court of competent jurisdiction to require the authority and the commissioners thereof to account as if it and they were the trustees of an express trust.

History: En. Sec. 19, Ch. 140, L. 1935.

62 C.J.S. Municipal Corporations § 546;
75 C.J.S. Receivers § 19.

Collateral References

Municipal Corporations 172; Receivers 14.

35-120. (5309.20) Remedies cumulative. All the rights and remedies hereinabove conferred shall be cumulative and in addition to all other rights and remedies that may be conferred upon such obligee of the authority by law or by any contract with the authority.

History: En. Sec. 20, Ch. 140, L. 1935.

Collateral References

Municipal Corporations 937.
64 C.J.S. Municipal Corporations § 1956.

35-121. (5309.21) Limitations on remedies of obligee. No interest of the authority in any property, real or personal, shall be subject to sale by the foreclosure of a mortgage thereon, either through judicial proceedings or the exercise of a power of sale contained in such mortgage, except in the case of the mortgages provided for in section 35-117. All property of the authority shall be exempt from levy and sale by virtue of an execution, and no execution or other judicial process shall issue against the same. No judgment against the authority shall be a charge or lien upon its property, real or personal. The provisions of this section shall not apply to or limit the right of obligees to foreclose any mortgage of the authority provided for in section 35-117 and, in case of a foreclosure sale thereunder, to obtain a judgment or decree for any deficiency due on the indebtedness secured thereby and issued on the credit of the authority. Such deficiency judgment or decree shall be a lien and charge upon the property of the authority which may be levied on and sold by virtue of an execution or other judicial process for the purpose of satisfying such deficiency judgment or decree.

History: En. Sec. 21, Ch. 140, L. 1935.

33 C.J.S. Executions § 35; 49 C.J.S. Judgments § 478; 59 C.J.S. Mortgages § 487.

Collateral References

Execution 22; Judgment 776; Mortgages 382.

35-122. (5309.22) Foreclosure sale subject to agreement with government. Notwithstanding anything in this act to the contrary, any purchaser or purchasers at a sale of real or personal property of the authority whether pursuant to any foreclosure of a mortgage, pursuant to judicial process or otherwise, shall obtain title subject to any contract between the authority and a government relating to the supervision by a government of the operation and maintenance of such property and the construction of improvements thereon.

History: En. Sec. 22, Ch. 140, L. 1935.

35-123. (5309.23) **Contracts with federal government.** In addition to the powers conferred upon the authority by other provisions of this act, the authority is empowered to borrow money and/or accept grants from the federal government for or in aid of the construction of any housing project which such authority is authorized by this act to undertake, to take over any land acquired by the federal government for the construction of a housing project, to take over or lease or manage any housing project constructed or owned by the federal government, and to these ends, to enter into such contracts, mortgages, trust indentures, leases or other agreements as the federal government may require including agreements that the federal government shall have the right to supervise and approve the construction, maintenance and operation of such housing project. In any contract with the federal government for annual contributions to an authority, the authority may obligate itself (which obligation shall be specifically enforceable and shall not constitute a mortgage, notwithstanding any other laws) to convey to the federal government possession of or title to the project to which such contract relates, upon the occurrence of a substantial default (as defined in such contract) with respect to the covenants or conditions to which the authority is subject; such contract may further provide that in case of such conveyance, the federal government may complete, operate, manage, lease, convey or otherwise deal with the project in accordance with the terms of such contract; provided, that the contract requires that, as soon as practicable after the federal government is satisfied that all defaults with respect to the project have been cured and that the project will thereafter be operated in accordance with the terms of the contract, the federal government shall reconvey to the authority the project as then constituted. It is the purpose and intent of this act to authorize every authority to do any and all things necessary to secure the financial aid and the co-operation of the federal government in the construction, maintenance and operation of any housing project which the authority is empowered by this act to undertake.

History: En. Sec. 23, Ch. 140, L. 1935;
amd. Sec. 5, Ch. 193, L. 1957.

63 C.J.S. Municipal Corporations §§ 950,
976; 64 C.J.S. Municipal Corporations
§ 1869.

Collateral References

Municipal Corporations 221, 226, 869.

35-124. (5309.24) **Security for funds deposited by authorities.** The authority may by resolution provide that (1) all moneys deposited by it shall be secured by obligations of the United States or of the state of a market value equal at all times to the amount of such deposits or (2) by any securities in which savings banks may legally invest funds within their control or (3) by an undertaking with such sureties as shall be approved by the authority faithfully to keep and pay over upon the order of the authority any such deposits and agreed interest thereon, and all banks and trust companies are authorized to give any such security for such deposits.

History: En. Sec. 24, Ch. 140, L. 1935.

Collateral References

Depositories 7.
26 C.J.S. Depositories § 9.

35-125. (5309.25) Additional powers of authority. A housing authority shall have the power (notwithstanding anything to the contrary contained in this act or in any other provision of law) to agree to any conditions attached to federal financial assistance relating to the determination of prevailing salaries or wages or payment of not less than prevailing salaries or wages or compliance with labor standards, in the development or administration of projects, and to include in any contract let in connection with a project, stipulations requiring that the contractor and any subcontractor comply with requirements as to minimum salaries or wages and maximum hours of labor, and comply with any conditions which the federal government may have attached to the financial aid of the project.

History: En. Sec. 25, Ch. 140, L. 1935; amd. Sec. 4, Ch. 153, L. 1941; amd. Sec. 6, Ch. 193, L. 1957.

Collateral References

Municipal Corporations[Ⓒ]192.
62 C.J.S. Municipal Corporations § 676.

35-125.1. Payments by housing authorities to local bodies. Notwithstanding any limitations in this or any other law, any housing authority may agree to make such payments to the county, city or municipality, the state, or any political subdivision or agency thereof (which payments such bodies are hereby authorized to accept) as the authority finds consistent with the maintenance of the low-rent character of housing projects or the achievement of the purposes of this housing authorities law.

History: En. Sec. 35-125.1 by Sec. 7, Ch. 193, L. 1957.

35-125.2. Act controlling. In so far as the provisions of this act are inconsistent with the provisions of any other law, the provisions of this act shall be controlling.

History: En. Sec. 9, Ch. 193, L. 1957.

35-126. (5309.26) Reports. The authority shall at least once a year file with the mayor of the city a report of its activities for the preceding year, and shall make any recommendations with reference to any additional legislation or other action that may be necessary in order to carry out the purposes of this act.

History: En. Sec. 26, Ch. 140, L. 1935.

Collateral References

Municipal Corporations[Ⓒ]192.
62 C.J.S. Municipal Corporations § 676.

35-127. (5309.27) Act controlling. That in so far as the provisions of this act are inconsistent with the provisions of any other law, the provisions of this act shall be controlling.

History: En. Sec. 28, Ch. 140, L. 1935.

Application of General Ordinances

In the light of this section, section 35-113, declaring that housing projects shall be subject to the planning, zoning, etc. laws applicable in its locality, must mean that such general laws shall be applied only when their application will not de-

feat the purpose of the housing act. State ex rel. Great Falls Housing Authority v. City of Great Falls, 110 M 318, 331, 100 P 2d 915.

Collateral References

Statutes[Ⓒ]224.
82 C.J.S. Statutes § 362.

35-128. (5309.27A) Notice, hearing and creation of authority for a county. (1) Any twenty-five (25) residents of a county may file a

petition with the county clerk setting forth that there is a need for an authority to function in the county. Upon the filing of such a petition the county clerk shall give notice of the time, place and purposes of a public hearing at which the board of county commissioners will determine the need for an authority in the county. Such notice shall be given at the county's expense by publishing a notice, at least ten (10) days preceding the day on which the hearing is to be held, in a newspaper having a general circulation in the county or, if there be no such newspaper, by posting such a notice in at least three (3) public places within the county, at least ten (10) days preceding the day on which the hearing is to be held.

(2) Upon the date fixed for said hearing held upon notice as provided herein, an opportunity to be heard shall be granted to all residents and taxpayers of the county and to all other interested persons. After such a hearing, the board of county commissioners shall determine (1) whether unsanitary or unsafe inhabited dwelling accommodations exist in the county, and/or (2) whether there is a lack of safe or sanitary dwelling accommodations in the county available for all the inhabitants thereof. In determining whether dwelling accommodations are unsafe or unsanitary, the board of county commissioners shall take into consideration the following: the physical condition and age of the buildings; the degree of overcrowding; the percentage of land coverage; the light and air available to the inhabitants of such dwelling accommodations; the size and arrangement of the rooms; the sanitary facilities; and the extent to which conditions exist in such buildings which endanger life or property by fire or other causes.

(3) If it shall determine that either or both of the above enumerated conditions exist, the board of county commissioners shall adopt a resolution so finding (which need not go into any detail other than the mere finding) and shall thereupon appoint, as hereinafter provided, five (5) commissioners to act as an authority. Said authority shall be a public body and a body corporate and politic upon the completion of the taking of the following proceedings:

(4) The commissioners of the authority shall present to the secretary of state an application signed by them which shall set forth (without any detail other than the mere recital) (1) that a notice has been given and public hearing has been held as aforesaid, that the board of county commissioners made the aforesaid determination after such hearing and appointed them as commissioners; (2) the name, and official residence of each of the commissioners, together with a certified copy of the appointment evidencing their right to office, the date and place of induction into and taking oath of office, and that they desire the housing authority to become a public body and a body corporate and politic under this act; (3) the term of office of each of the commissioners; (4) the name which is proposed for the corporation; and (5) the location of the principal office of the proposed corporation. The application shall be subscribed and sworn to by each of said commissioners before an officer authorized by the laws of the state to take and certify oaths, who shall certify upon the application that he personally knows the commissioners and knows them to be

the officers as asserted in the application, and that each subscribed and swore thereto in the officer's presence. The secretary of state shall examine the application and if he finds that the name proposed for the corporation is not identical with that of a person or of any other corporation of this state or so nearly similar as to lead to confusion and uncertainty he shall receive and file it and shall record it in an appropriate book of record in his office.

(5) When the application has been made, filed and recorded, as herein provided, the authority shall constitute a public body and a body corporate and politic under the name proposed in the application; the secretary of state shall make and issue to the said commissioners, a certificate of incorporation pursuant to this act, under the seal of the state, and shall record the same with the application.

(6) The area of operation of such authority shall include said county, but in no event shall it include any city of the first or second class.

If the board of county commissioners, after a hearing as aforesaid, shall determine that neither of the above enumerated conditions exist, it shall adopt a resolution denying the petition. After three (3) months shall have expired from the date of the denial of any such petitions, subsequent petitions may be filed as aforesaid and new hearings and determinations made thereon.

(7) In any suit, action or proceeding involving the validity or enforcement of, or relating to any contract of the authority, the authority shall be conclusively deemed to have been established in accordance with the provisions of this act upon proof of the issuance of the aforesaid certificate by the secretary of state. A copy of such certificate, duly certified by the secretary of state, shall be admissible in evidence in any such suit, action or proceeding, and shall be conclusive proof of the filing and contents thereof.

History: En. Sec. 5, Ch. 153, L. 1941.

35-129. (5309.27B) Commissioners and powers of authority for a county. The commissioners of a housing authority created for a county may be appointed and removed by the board of county commissioners of the county in the same manner as the commissioners of a housing authority created for a city may be appointed and removed by the mayor, and except as otherwise provided herein, each housing authority created for a county and the commissioners thereof shall have the same functions, rights, powers, duties and limitations provided for housing authorities created for cities and the commissioners of such housing authorities; provided, that for such purposes the term "mayor" or "council" as used in the housing authorities law and any amendments thereto shall be construed as meaning "board of county commissioners," the term "city clerk" as used therein shall be construed as meaning "county clerk" and the term "city" as used therein shall be construed as meaning "county" unless a different meaning clearly appears from the context.

History: En. Sec. 5, Ch. 153, L. 1941.

35-130. (5309.27C) Rural housing projects. Housing authorities created for counties are specifically empowered and authorized to borrow money, accept grants and exercise their other powers to provide housing for farmers of low income. In connection with such projects, such housing authorities may enter into such leases or purchase agreements, accept such conveyances and rent or sell dwellings forming part of such projects to or for farmers of low income, as such housing authority deems necessary in order to assure the achievement of the objectives of this act. Such leases, agreements or conveyances may include such covenants as the housing authority deems appropriate regarding such dwellings and the tracts of lands described in any such instrument, which covenants shall be deemed to run with the land where the housing authority deems it necessary and the parties to such instrument so stipulate. Nothing contained in this section shall be construed as limiting any other powers of any housing authority, except that no more than two acres of land per dwelling, together with the dwelling houses thereon provided for under the provisions of this act, shall be exempt from taxation and that upon title to said two acres of land, and the dwelling houses thereon passing to private ownership, the said land and the dwelling houses thereon shall be restored to the tax rolls, and be subject to taxation.

History: En. Sec. 5, Ch. 153, L. 1941.

35-131. (5309.27D) Housing applications by farmers. The owner of any farm operated, or worked upon, by farmers of low income in need of safe and sanitary housing may file an application with a housing authority of a county requesting that it provide for a safe and sanitary dwelling or dwellings for occupancy by such farmers of low income. Such applications shall be received and examined by housing authorities in connection with the formulation of projects or programs to provide housing for farmers of low income.

History: En. Sec. 5, Ch. 153, L. 1941.

35-132. (5309.27E) Definition of farmers of low income. "Farmers of low income" shall mean persons or families who at the time of their admission to occupancy in a dwelling of the authority: (1) live under unsafe or unsanitary housing conditions; (2) derive their principal income from operating or working upon a farm; and (3) had an aggregate average annual net income for the three (3) years preceding their admission that was less than the amount determined by the authority to be necessary, within its area of operation, to enable them, without financial assistance, to obtain decent, safe and sanitary housing, without overcrowding.

History: En. Sec. 5, Ch. 153, L. 1941.

35-133. (5309.27F) Operation not for profit. It is hereby declared to be the policy of this state that each housing authority shall manage and operate its housing projects in an efficient manner so as to enable it to fix the rentals for dwelling accommodations at the lowest possible rates consistent with its providing decent, safe and sanitary dwelling accom-

modations, and that no housing authority shall construct or operate any such project for profit, or as a source of revenue to the city or county.

History: En. Sec. 5, Ch. 153, L. 1941.

35-134. Act controlling. In so far as the provisions of this act are inconsistent with the provisions of any other law, the provisions of this act shall be controlling.

History: En. Sec. 7, Ch. 153, L. 1941.

35-135. (5309.28) Declaration of necessity. It is hereby declared that unsanitary or unsafe dwelling accommodations exist in various areas of the state, and that consequently many persons of low income are forced to reside in such dwelling accommodations; that these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals and welfare of the citizens of the state and impair economic values; that the clearance, replanning and reconstruction of the areas in which unsanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which private property may be acquired; that it is in the public interest that work on such projects be instituted as soon as possible in order to relieve unemployment which now constitutes an emergency; and the necessity in the public interest for the provision hereinafter enacted, is hereby declared as a matter of legislative determination.

History: En. Sec. 1, Ch. 138, L. 1935.

Legislative Finding of Public Necessity Upheld

The legislature having determined and declared by this section the necessity in the public interest for slum clearance and

that such is a public purpose, the court will not interfere with such finding in the absence of a clear showing that such determination was wrong. *Rutherford v. City of Great Falls*, 107 M 512, 516, 86 P 2d 656.

35-136. (5309.29) Definitions. The following terms, whenever used or referred to in this act shall have the following respective meanings, unless a different meaning clearly appears from the context:

(1) "Housing authority" shall mean any housing authority organized pursuant to the housing authorities law of this state.

(2) "City" shall mean any city of the first or second class of the state which is, or is about to be, included in the territorial boundaries of a housing authority.

(3) "Municipality" shall mean any city, town or incorporated village of the state.

(4) "Housing project" shall mean any undertaking (a) to demolish, clear, remove, alter or repair unsafe or unsanitary housing, and/or (b) to provide dwelling accommodations for persons of low income, and said term may also include such buildings and equipment for recreational or social assemblies for educational, health or welfare purposes, and such necessary utilities as are designed primarily for the benefit and use of the housing authority and/or the occupants of such dwelling accommodations.

History: En. Sec. 2, Ch. 138, L. 1935.

35-137. (5309.30) Conveyance, lease or agreement in aid of housing project. For the purpose of aiding and co-operating in the planning,

construction and operation of housing projects located within their respective territorial boundaries, the state, its subdivisions and agencies, and any county, city, or municipality of the state may, upon such terms, with or without consideration, as it may determine:

(a) grant, sell, convey or lease any of its property to a housing authority or the United States of America or any agency thereof; and

(b) to the extent that it is within the scope of each of their respective functions, (1) cause the services customarily provided by each of them to be rendered for the benefit of the housing authority and/or the occupants of such housing projects, and (2) provide and maintain parks and sewage, water and other facilities adjacent to or in connection with housing projects, and (3) enter into any agreement to open, close, pave, install, or change the grade of streets, roads, roadways, alleys, sidewalks, or other such facilities, to change the city or municipality map, to plan, replan, zone or rezone any part of the city or municipality.

In connection with the exercise of this power, any city or municipality may incur the entire expense of any such public improvements located within its territorial boundaries without assessment against abutting property owners. Any law or statute to the contrary notwithstanding, any gift, grant, sale, conveyance, lease or agreement provided for in this section may be made by the state, its subdivisions and agencies, and any county, city, or municipality of the state without appraisal, public notice, advertisement or public bidding.

History: En. Sec. 3, Ch. 138, L. 1935.

References

State ex rel. Great Falls Housing Authority v. City of Great Falls, 110 M 318, 330, 100 P 2d 915.

Collateral References

Municipal Corporations § 225(1), 265.
63 C.J.S. Municipal Corporations §§ 965, 1036.

35-138. (5309.31) Advances and donations by city and municipality.

Immediately after the incorporation of the housing authority, the council or other governing body of the city included within the territorial boundaries of such authority shall make an estimate of the amount of money necessary for the administrative expenses and overhead of the housing authority during the first year following the incorporation of such housing authority, and shall appropriate such amount to the authority out of any moneys in the city treasury not appropriated to some other purposes, and shall cause the moneys so appropriated to be paid the authority as a donation. In addition thereto, the city and any municipality located in whole or in part within the boundaries of a housing authority shall have the power annually and from time to time to make donations or advances to the authority of such sums as the city or municipality in its discretion may determine. The authority, when it has money available therefor, shall reimburse the city or municipality for all advances by way of loan made to it.

History: En. Sec. 4, Ch. 138, L. 1935.

Governmental Function

A city in advancing money to a housing authority is aiding slum clearance and thereby lightens its own burden of pro-

tecting all citizens against disease, crime and immorality; therefore the city is performing indirectly, through a public agency created by the state and sanctioned by its own governing authority, one of the primary functions of municipal

government. *Rutherford v. City of Great Falls*, 107 M 512, 519, 86 P 2d 656.

Mandatory Appropriations

The language of this section is mandatory in its terms, and when the authority is created the city shall make an estimate of the amount of money necessary for the first year's expense and shall appropriate the same to the authority. It is the plain

legal duty of the city, when the authority is created by its consent, to make an estimate as provided in this section, and make the appropriation. *State ex rel. Helena Housing Authority v. City of Helena*, 108 M 347, 355, 90 P 2d 514.

Collateral References

Municipal Corporations Ⓒ 871.
64 C.J.S. Municipal Corporations § 1845.

35-139. (5309.32) Action of city or municipality by resolution. Except as otherwise provided in this act, all action authorized to be taken under this act by the council or other governing body of any city or of any municipality may be by resolution adopted by a majority of all the members of its council or other governing body, which resolution may be adopted at the meeting of the council or other governing body at which such resolution is introduced and shall take effect immediately upon such adoption, and no such resolution need be published or posted.

History: En. Sec. 5, Ch. 138, L. 1935.

62 C.J.S. Municipal Corporations §§ 416, 442.

Collateral References

Municipal Corporations Ⓒ 106, 120.

35-140. (5309.33) Purpose of act. It is the purpose and intent of this act that the state, its subdivisions and agencies, in any county, city or municipality of the state shall be authorized, and are hereby authorized, to do any and all things necessary to aid and co-operate in the planning, construction and operation of housing projects by the United States of America and by housing authorities.

History: En. Sec. 6, Ch. 138, L. 1935.

35-141. (5309.34) Supplemental nature of act. The powers conferred by this act shall be in addition and supplemental to the powers conferred by any other law.

History: En. Sec. 7, Ch. 138, L. 1935.

Collateral References

Municipal Corporations Ⓒ 597.
62 C.J.S. Municipal Corporations § 133.

References

State ex rel. Great Falls Housing Authority v. City of Great Falls, 110 M 318, 330, 100 P 2d 915.

35-142. (5309.35) Investment by fiduciaries in home owners' loan corporation bonds authorized. Notwithstanding any other provision of law, it shall be lawful for any executor, administrator, guardian, or conservator, trustee or other fiduciary to invest the funds or moneys in their custody or possession, eligible for investment, in bonds of the Home Owners' Loan Corporation or debentures issued by the federal housing administrator, guaranteed as to principal and interest by the United States government. Notwithstanding other provisions of the law, it shall be lawful for any insurance company, building and loan association, bank, trust company, investment company and other financial institutions operating under the laws of this state to invest the funds or moneys in their custody or possession, eligible for investment, in bonds of the Home Owners' Loan Corporation, in debentures issued by the federal housing administrator and in obligations of National Mortgage Associations.

History: En. Sec. 1, Ch. 5, Ex. L. 1933; Guardian and Ward 53; Trusts 217
amd. Sec. 1, Ch. 37, L. 1935; amd. Sec. 1, (3).
Ch. 24, L. 1937.

Collateral References

Executors and Administrators 102;

33 C.J.S. Executors and Administrators
§ 206; 39 C.J.S. Guardian and Ward § 84;
90 C.J.S. Trusts § 326.

35-143. Housing bonds legal investments and security. The state and all public officers, municipal corporations, political subdivisions, and public bodies, all banks, bankers, trust companies, savings banks and institutions, buildings and loan associations, savings and loan associations, investment companies and other persons carrying on a banking business, all insurance companies, insurance associations and other persons carrying on an insurance business, and all executors, administrators, guardians, trustees and other fiduciaries may legally invest any sinking funds, moneys or other funds belonging to them or within their control in any bonds or other obligations issued by a housing authority established pursuant to the housing authorities law of this state (sections 35-101 to 35-133 and any laws amendatory or supplemental thereto), or issued by any public housing authority or agency in the United States, when such bonds or other obligations are secured by a pledge of annual contributions to be paid by the United States government or any agency thereof, and such bonds and other obligations shall be authorized security for all public deposits and shall be fully negotiable in this state; it being the purpose of this act to authorize any persons, firms, corporations, associations, political subdivisions, bodies and officers, public or private, to use any funds owned or controlled by them, including (but not limited to) sinking, insurance, investment, retirement, compensation, pension and trust funds, and funds held on deposit, for the purchase of any such bonds or other obligations and that any such bonds or other obligations shall be authorized security for all public deposits and shall be fully negotiable in this state; provided, however, that nothing contained in this act shall be construed as relieving any person, firm or corporation from any duty of exercising reasonable care in selecting securities.

History: En. Sec. 1, Ch. 218, L. 1943.

35-144. Act controlling. In so far as the provisions of this act are inconsistent with the provisions of any other law, the provisions of this act shall be controlling.

History: En. Sec. 3, Ch. 218, L. 1943.

35-145. (5309.36) Home owners' loan corporation bonds as security for deposit of public funds. Subject to such rules and regulations as may be prescribed by the superintendent of banks, the bonds and other obligations herein made eligible for investment, may be used as security for all deposits of public funds or obligations for which depository bonds or any kind of bonds or other securities are required, or may by law be deposited as security.

History: En. Sec. 2, Ch. 5, Ex. L. 1933;
amd. Sec. 2, Ch. 37, L. 1935.

Collateral References

Depositories 7.
26 C.J.S. Depositories § 9.

35-146. (5309.37) Housing authorities may be dissolved when and how. If after the lapse of two years from the creation of a housing authority by the filing and recording in the office of the secretary of state of the application as provided in section 35-104, no housing project has been commenced and no contract has been signed by the council or the mayor on behalf of the municipality with the housing authority or United States housing authority providing for contributions by the municipality either in cash or by tax remissions or exemptions in aid or support of any such housing project, such housing authority may be dissolved in the manner following: At any regular meeting of the council, without any previous notice, the council may, in its discretion, adopt a resolution declaring that dwelling accommodations in the city and surrounding area are such that there is no need for the construction of any housing project and that the need for the creation of a housing authority no longer exists, and that the same be disbanded and dissolved, which resolution shall be spread upon the minutes of the meeting of the council. Thereupon a copy of the said resolution shall be duly certified by the mayor and city clerk and filed for record in the office of the secretary of state, whereupon and from thenceforth the said housing authority shall be and become dissolved and all functions thereof cease and the commissioners thereof discharged from any further duties or powers.

History: En. Sec. 1, Ch. 25, L. 1941.

CHAPTER 2

VALIDATION PROCEEDINGS UNDER HOUSING AUTHORITIES LAW

Section 35-201. Creation and proceedings of housing authorities validated.

35-202. Contracts and obligations of housing authorities validated.

35-203. Notes and bonds validated.

35-201. Creation and proceedings of housing authorities validated. The creation and establishment of housing authorities in the state of Montana under the provisions of the housing authorities law (chapter 1 of this Title), together with all proceedings, acts and things heretofore undertaken, performed or done with reference thereto, are hereby validated, ratified, confirmed, approved and declared legal in all respects, notwithstanding any defect or irregularity therein or any want of statutory authority.

History: En. Sec. 1, Ch. 118, L. 1941.

35-202. Contracts and obligations of housing authorities validated. All contracts, agreements, obligations and undertakings of such housing authorities heretofore entered into relating to financing or aiding in the development, construction, maintenance or operation of any housing project or projects or to obtaining aid therefor from the United States housing authority, including (without limiting the generality of the foregoing) loan and annual contributions contracts with the United States housing authority, agreements with municipalities or other public bodies (including those which are pledged or authorized to be pledged for the protection of the holders of any notes or bonds issued by such housing authorities or

which are otherwise made a part of the contract with such holders of notes or bonds) relating to co-operation and contributions in aid of housing projects, payments (if any) in lieu of taxes, furnishing of municipal services and facilities, and the elimination of unsafe and insanitary dwellings, and contracts for the construction of housing projects, together with all proceedings, acts and things heretofore undertaken, performed or done with reference thereto, are hereby validated, ratified, confirmed, approved and declared legal in all respects, notwithstanding any defect or irregularity therein or any want of statutory authority.

History: En. Sec. 2, Ch. 118, L. 1941.

35-203. Notes and bonds validated. All proceedings, acts and things heretofore undertaken, performed or done in or for the authorization, issuance, execution and delivery of notes and bonds by housing authorities for the purpose of financing or aiding in the development or construction of a housing project or projects, and all notes and bonds heretofore issued by housing authorities are hereby validated, ratified, confirmed, approved and declared legal in all respects, notwithstanding any defect or irregularity therein or any want of statutory authority.

History: En. Sec. 3, Ch. 118, L. 1941.

CHAPTER 3

ADDITIONAL WAR POWERS OF HOUSING AUTHORITIES

- Section 35-301. Housing authorities activities authorized in war area.
 35-302. Co-operation with federal government.
 35-303. Powers of city, county and other public bodies with respect to projects.
 35-304. Payment of rentals in lieu of taxes on real property.
 35-305. Definitions—development project deemed initiated, when.
 35-306. Act constitutes an independent authorization—powers granted additional.
 35-307. Termination of authority under act.

35-301. Housing authorities activities authorized in war area. Any housing authority now or hereafter established pursuant to chapter 1 of this Title (herein called the “housing authorities law”) may undertake the development or administration, or both, of projects to provide housing for persons engaged or to be engaged in war industries or activities if it finds that an acute shortage of housing for such persons exists or impends in the area within the authority’s boundaries or any part thereof and that the necessary housing would not otherwise be provided when needed. In the ownership, development or administration of projects under this act, a housing authority shall have all the rights, powers, privileges and immunities that it has under any provision of law relating to the ownership, development or administration of low-rent housing and slum clearance projects, in the same manner as though all the provisions of law applicable thereto were applicable to projects developed or administered hereunder; provided any housing authority now or hereafter established pursuant to chapter 1 of this Title (known as the housing authorities law), and/or the federal government shall make and agree to make, with respect to any

project owned and administered by it under this act, such payments for services and facilities furnished for such project by the city, county or other political subdivision of the state in which such project is located as may be agreed upon; and provided further, that a project developed or administered under this act by a housing authority to provide housing for persons engaged or to be engaged in war industries or activities shall not be subject to any provisions of the housing authorities law restricting rentals or tenant selection. As soon after the termination of the present war as it is found to be practicable, all projects owned and administered by a housing authority under this act shall be administered for the purposes and in accordance with all the provisions of the housing authorities law.

History: En. Sec. 1, Ch. 215, L. 1943.

Compiler's Note

In view of section 35-307, no new projects may now be initiated under this

chapter and the chapter would appear to be obsolete, except as some of its provisions may still apply to projects initiated during World War II.

35-302. Co-operation with federal government. A housing authority may exercise any or all of its powers to aid and co-operate with the federal government in making housing available for persons engaged or to be engaged in war industries or activities; may act as agent for the federal government in developing and administering projects undertaken by the federal government to provide such housing; may lease such projects from the federal government; and may arrange with public bodies and private agencies for such services and facilities as may be needed for such projects, subject to the provisions of this act.

History: En. Sec. 2, Ch. 215, L. 1943.

35-303. Powers of city, county and other public bodies with respect to projects. With respect to projects undertaken by a housing authority or the federal government to provide housing for persons engaged or to be engaged in war industries, any city, county or other public body shall have all the rights and powers to aid and co-operate in the development or administration of such projects that it has under any provision of law relating to its aiding or co-operating in the development or administration of low-rent housing and slum clearance projects, in the same manner as though all the provisions of law applicable thereto were applicable to projects undertaken by a housing authority or by the federal government to provide housing for persons engaged or to be engaged in war industries or activities. With respect to projects located outside the territorial boundaries of a city, county or other public body, which are undertaken by a housing authority or the federal government to provide housing for persons engaged or to be engaged in war industries or activities, such city, county or other public body may furnish or contract to furnish, upon such terms as it deems advisable, public services or facilities for any such project if the governing body of the city or county, as the case may be, in which such project is located, shall, by resolution, consent thereto, subject to the provisions of this act.

History: En. Sec. 3, Ch. 215, L. 1943.

35-304. Payment of rentals in lieu of taxes on real property. Any housing authority now or hereafter established pursuant to chapter 1 of

this Title (known as the housing authorities law) and/or the federal government may pay from rentals, annual sums in lieu of taxes, to any state and/or political subdivision thereof, with respect to any real property, including improvements thereon, now owned or hereafter acquired or held either by such housing authority or the federal government. The amount so paid for any year, upon such property, shall not exceed the taxes which would be paid to the state and/or subdivision thereof, as the case may be upon such property, if it were not exempt from taxation, with such allowances as may be considered to be appropriate for expenditures by the government for streets, utilities, or other public services to serve such property.

History: En. Sec. 4, Ch. 215, L. 1943.

35-305. Definitions — development project deemed initiated, when. Wherever used in this act, the term “persons” shall include the families of such persons who are living with them, the term “federal government” shall include any department, agency or instrumentality thereof, and the term “city” shall mean any city or town in the state. The development of a project shall be deemed to have been initiated under this act if a housing authority has issued any bonds, notes or other obligations to finance the cost thereof.

History: En. Sec. 5, Ch. 215, L. 1943.

35-306. Act constitutes an independent authorization—powers granted additional. This act shall constitute an independent authorization for a housing authority to undertake the development or administration of projects to provide housing for persons engaged or to be engaged in war industries or activities and to co-operate with, or act as agent for, the federal government in the development or administration of projects undertaken by the federal government to make housing available for such persons. In acting hereunder, a housing authority shall not be subject to any limitations, restrictions or requirements of other laws (except those relating to land acquisition) prescribing or limiting the procedure or action to be taken in the development or administration of any buildings, property or public works, including, but not limited to low-rent housing and slum clearance projects or undertakings or projects of municipal or public corporations or political subdivisions or agencies of the state. A housing authority may do any and all things necessary or desirable to co-operate with, or act as agent for, the federal government, or to secure financial aid, for the expeditious development or the administration of projects to make housing available for persons engaged or to be engaged in war industries or activities and to effectuate the purposes of this act. All powers conferred by this act shall be in addition and supplemental to the powers conferred by any other law, and nothing contained herein shall be construed as limiting such other powers, except as herein provided.

History: En. Sec. 6, Ch. 215, L. 1943.

35-307. Termination of authority under act. No housing authority shall initiate the development of any housing project under this act after the termination of the present war.

History: En. Sec. 7, Ch. 215, L. 1943.

Compiler's Note

The phrase "the present war" at the end of this section means World War II.

CHAPTER 4

EMERGENCY WAR AND VETERANS' HOUSING FACILITIES

Section 35-401 to 35-407. Obsolete.

35-408. Purpose of 1955 act.

35-409. Definitions.

35-410. Authority of local agencies to acquire housing.

35-411. Administration of housing facilities.

35-412. Exemption from rental and tenant selection provisions of housing authority law.

35-413. Prior acts validated.

35-414. Termination of operation.

35-401 to 35-407. Obsolete.

Compiler's Note

These sections (Secs. 1 to 7, Ch. 41, L. 1951), relating to emergency war and veterans' housing facilities, are omitted

as obsolete in view of provisions in section 35-407 for termination of operations not later than May 1, 1955.

35-408. Purpose of 1955 act. It is hereby declared that there exists a housing shortage in the state of Montana. That of the hundreds of veterans dismissed from the military service, many of such veterans and other persons are still unable to find adequate housing for themselves or their families, and by reason thereof are being compelled to live in unsafe, unsanitary and congested dwellings. That by virtue of the Housing Act of 1950, being Title II, Chapter 94, Public Law 475 of the laws of the Eighty-first Congress Second Session, war and veterans' housing projects constructed in the state of Montana by federal government will be destroyed and removed unless otherwise provided for. That the adoption of this act will enable many veterans and their families to maintain their status in the community and conduct their employment without worry as to the health, sanitary conditions and welfare of their families.

History: En. Sec. 1, Ch. 9, L. 1955.

NOTE.—Title II of the Housing Act of 1950, referred to in this section will be found in United States Code, Tit. 42, secs. 1412, 1523, 1542, 1553, 1561, 1564, 1574, 1576, 1581 to 1590.

Collateral References

Health 32.

39 C.J.S. Health § 22.

35-409. Definitions. The following terms, whenever used or referred to in this act, shall have the following respective meanings, unless a different meaning clearly appears from the context:

(1) "Local agency" means any county, city, town, school district, or housing authority of the state.

(2) "Housing" means any temporary war or veterans' housing acquired from the United States of America under the terms and provisions of the Housing Act of 1950, being Title II, Chapter 94, Public Law 475, of the laws of the Eighty-first Congress, Second Session, for the purpose of providing temporary housing for veterans and for families of servicemen, located within the boundaries of any local agency.

(3) "Veterans" includes, in so far as permitted by federal law, any person who has served in the military or naval forces of the United States and has been discharged or released therefrom under conditions other than dishonorable.

(4) "Families of servicemen" includes, in so far as permitted by federal law, the families of any person who is serving in the military or naval forces of the United States, and the unmarried widow of a deceased veteran.

(5) "Families" is limited to the spouse and legal dependents who are members of the household.

History: En. Sec. 2, Ch. 9, L. 1955.

35-410. Authority of local agencies to acquire housing. For the purposes of this act, any local agency may expend or use its funds and employ its personnel to do anything necessary to maintain housing acquired under the terms of the Federal Public Housing Act of 1950, and may remodel, repair, or remove and re-erect such housing facilities, but shall not erect or construct new housing facilities. The local agency may also provide for the installation of necessary appurtenances and utilities. For the purposes of this act, any local agency may enter into agreements with the federal government pursuant to the Housing Act of 1950.

History: En. Sec. 3, Ch. 9, L. 1955.

35-411. Administration of housing facilities. The local agency shall administer any housing facility acquired pursuant to this act and shall let or lease accommodations therein to veterans and families of servicemen upon such terms and for such rentals as is reasonable, but in such manner as to secure, in so far as practical, a return of the investments made by it; provided, however, that before any return of investments in such housing shall accrue to any housing authority there shall first be paid to any state and/or political subdivision thereof, annual sums in lieu of taxes which amounts so paid for any year, upon such property, shall not exceed the taxes which would be paid to the state and/or subdivision thereof, as the case may be, upon such property if it were not exempt from taxation, with such further allowances as may be considered to be appropriate for expenditures by the government for streets, utilities or other public services to serve such property.

History: En. Sec. 4, Ch. 9, L. 1955.

35-412. Exemption from rental and tenant selection provisions of housing authority law. In providing housing for veterans and other families, single veterans, and families of servicemen, pursuant to the provisions of this act, a housing authority shall not be subject to any of the provisions of the housing authority law relating to rentals and tenant selection.

History: En. Sec. 5, Ch. 9, L. 1955.

35-413. Prior acts validated. Any and all contracts, undertakings, and commitments, together with acts and proceedings in respect thereto, heretofore done or undertaken by any local agency for the provisions of hous-

ing for veterans and their families or single veterans and families of servicemen are hereby validated and declared legal.

History: En. Sec. 6, Ch. 9, L. 1955.

35-414. Termination of operation. The operation and maintenance of any housing facility acquired pursuant to this act may be terminated at any time by any local agency on or after June 1, 1962 if consistent with the terms of the federal act under which it was acquired, or if the legislature determines that the necessity therefor no longer exists, but in no event shall such housing facility be operated and maintained by any local agency after the first day of May, 1963.

When any housing facility is discontinued, in whole or in part, it shall be liquidated in such manner as will secure the greatest return to the local agency; provided, however, that any lands acquired under this act may be retained by the local agency. The term "liquidated" as used in this section, in so far as the same pertains to any temporary housing facility dwelling structures, shall mean and include dismantling, and disposal thereof by the local agency for purposes other than a dwelling place for human beings.

History: En. Sec. 7, Ch. 9, L. 1955;
amd. Sec. 1, Ch. 17, L. 1959; amd. Sec. 1,
Ch. 231, L. 1961.

TITLE 36

HUSBAND AND WIFE

Chapter 1. Husband and wife—mutual obligations, powers and property rights, 36-101 to 36-131.

CHAPTER 1

HUSBAND AND WIFE—MUTUAL OBLIGATIONS, POWERS AND PROPERTY RIGHTS

- Section 36-101. Mutual obligations of husband and wife.
36-102. Rights of husband as head of family.
36-103. Duties of husband to wife as to support.
36-104. In other respects their interests separate.
36-105. Husband and wife may make contracts.
36-106. Extent to which their legal relation may be altered by contract—separation agreement.
36-107. Consideration for separation.
36-108. May be joint tenants.
36-109. Liability for acts or debts of each other.
36-110. Married women may prosecute actions.
36-111. Separate property of wife.
36-112. Inventory of separate property of wife.
36-113. Effect of filing inventory.
36-114. Earnings and accumulations of wife.
36-115. Same, when separated.
36-116. Work and labor of wife.
36-117. Debts of wife contracted before marriage.
36-118. Separate property of wife—how far liable.
36-119. Support of wife.
36-120. Husband not liable when abandoned by wife.
36-121. When wife must support husband.
36-122. Rights of husband and wife—how governed.
36-123. Marriage settlement contracts—how executed.
36-124. To be acknowledged and recorded.
36-125. Effect of recording.
36-126. Minors may make marriage settlement.
36-127. Married woman may act as executrix, guardian or trustee.
36-128. May sue and be sued.
36-129. Liable for her own contracts.
36-130. May make contracts.
36-131. Tenancy by curtesy not allowed.

36-101. (5782) Mutual obligations of husband and wife. Husband and wife contract toward each other obligations of mutual respect, fidelity, and support.

History: En. Sec. 210, Civ. C. 1895;
re-en. Sec. 3690, Rev. C. 1907; re-en. Sec.
5782, R. C. M. 1921. Cal. Civ. C. Sec.
155. Field Civ. C. Sec. 75.

Cross-References

Divorce, secs. 21-101 to 21-149.

Dower, secs. 22-101 to 22-117.

Husband and wife testifying against each other, privileges, secs. 93-701-4, 94-8802.

Marriage, secs. 48-101 to 48-206.

Married woman as witness against husband, sec. 93-701-4.

Purchase at Judicial Sale

A wife may purchase her husband's real estate at execution or foreclosure sale and hold it as her separate property, if the transaction is bona fide and payment is made with her own money. *Marcellus v. Wright*, 51 M 559, 564, 154 P 714.

Purpose of Chapter

The primary purpose of the Married Women's Act (secs. 36-101 to 36-131) was to free the wife from certain disabilities imposed upon her by the common law, under which her legal personality and property were merged in the husband, i. e., to place the wife upon an equal footing with the husband as to the ownership, control and enjoyment of property, as to contractual rights in general, with an equal right to resort to the courts, nothing appearing therein to disturb the marital unity otherwise. *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922.

Tort Actions

The common-law doctrine under which one spouse may not sue the other for a personal tort is in force in Montana, and therefore, the complaint of a wife against her husband for damages resultant from personal injuries sustained by reason of the alleged negligence of defendant's chauffeur while plaintiff was riding in defendant's car, was vulnerable to a demurrer. *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922.

36-102. (5783) Rights of husband as head of family. The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto.

History: En. Sec. 211, Civ. C. 1895; re-en. Sec. 3691, Rev. C. 1907; re-en. Sec. 5783, R. C. M. 1921. Cal. Civ. C. Sec. 156. Field Civ. C. Sec. 76.

Cross-Reference

Residence of husband presumptively residence of wife, sec. 83-303.

Management of Property

Husband as head of the family has right to manage his property, including an apartment house, and his wife is required to conform to his exercise of such right. *Crenshaw v. Crenshaw*, 120 M 190, 182 P 2d 477, 490.

Venue for Divorce Trial

Where husband had taken up his residence and rented a farm in C county and invited his wife and children, then living in the adjoining county of L to join him, which invitation the wife accepted, and later she returned to L county where she

References

Cited or applied as section 3690, Revised Codes, in *State ex rel. Robison v. District Court et al.*, 56 M 592, 186 P 335; *Betor v. National Biscuit Co.*, 85 M 481, 488, 280 P 641; *Bingham v. National Bank of Montana*, 105 M 159, 167, 72 P 2d 90; *In re Marsh's Estate*, 125 M 239, 234 P 2d 459, 461.

Collateral References

Husband and Wife ¶1, 4.
41 C.J.S. *Husband and Wife* §§ 4, 15, 16.
26 Am. Jur. 634, *Husband and Wife*, § 5.

Elements of causation in alienation of affections action. 19 ALR 2d 471.

Wife's right of action for loss of consortium. 23 ALR 2d 1378.

Condonation or forgiveness of spouse as affecting liability for alienation of affections. 38 ALR 2d 1234.

Right of action at common law for loss of consortium in consequence of sale or gift of intoxicating liquor or habit-forming drugs to spouse. 75 ALR 2d 834.

filed her complaint for divorce, the proper place of trial was in C county, the place of residence of the defendant husband, and error was committed in refusing his motion for change of venue to C county. *Archer v. Archer*, 106 M 116, 118, 75 P 2d 783.

References

Gates v. Powell, 77 M 554, 562, 252 P 377; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922; *Emery v. Emery*, 122 M 201, 200 P 2d 251, 263; *Murphy v. Murphy*, 134 M 594, 335 P 2d 296, 298.

Collateral References

Husband and Wife ¶3.
41 C.J.S. *Husband and Wife* §§ 9, 10.
26 Am. Jur. 638, *Husband and Wife*, § 10.

Right to visit adult married relative over objection of latter's spouse. 38 ALR 2d 1447.

36-103. (5784) Duties of husband to wife as to support. The husband must support himself and wife out of his property or by his labor. If he is unable to do so she must assist him as far as she is able.

History: En. Sec. 212, Civ. C. 1895; re-en. Sec. 3692, Rev. C. 1907; re-en. Sec. 5784, R. C. M. 1921. Field Civ. C. Sec. 77.

Cross-Reference

Abandonment of wife, penalty, secs. 94-301 to 94-303.

Ability of Husband to Support

The fact that person has no property does not relieve him of his obligation to support his wife and children when it is shown that he has the ability to provide such support by his labor. State ex rel. Houtchens v. District Court, 122 M 76, 199 P 2d 272, 275.

Action against Third Persons for Wrongful Death

Although the wife and children have been deprived of this support by the death of the father, caused by the wrongful act or neglect of another, they do not have a cause of action under section 93-2810 against such other person unless the father, if death had not ensued, could have maintained an action in his own behalf. Melville v. Butte-Balaklava Copper Co., 47 M 1, 5, 130 P 441.

Divorce Decree without Support Provisions

The fact that a divorce decree is silent as to support does not relieve the husband of his legal duty to support his family if he is able, particularly where repeated attempts are made to get support. Murphy v. Murphy, 134 M 594, 335 P 2d 296, 297.

Husband Liable for Necessities

This section makes it the duty of the husband to support his wife out of his property or labor, and by the provisions of section 36-119, if he neglects to do so (unless the wife has abandoned him without justification), any person may in good faith supply her with articles necessary for her support and recover value therefor from him. State ex rel. La Point v. District Court, 69 M 29, 37, 220 P 88.

Where the husband fails or refuses to furnish the wife the things necessary for her support, she may, while living with him or while living separate from him because of his misconduct, bind him by her contracts with third persons for such necessities; under such circumstances the law creates an implied agency on the part of the wife, his consent being implied by reason of the marital relationship. McQuay et al. v. McQuay, 86 M 535, 537, 284 P 532.

36-104. (5785) In other respects their interests separate. Neither husband nor wife has any interest in the property of the other, except as mentioned in the preceding section, but neither can be excluded from the other's dwelling.

History: En. Sec. 213, Civ. C. 1895; re-en. Sec. 3693, Rev. C. 1907; re-en. Sec. 5785, R. C. M. 1921. Cal. Civ. C. Sec. 157. Field Civ. C. Sec. 78.

Interest of Wife in Estate

The services which a wife owes her husband do not create for her a joint interest in his estate. In re Marsh's Estate, 125 M 239, 234 P 2d 459, 462.

Presumption of Duty to Support

The law imposes upon the husband the legal duty of supporting his wife out of his property or by his labor, if he is able to do so (this section), and a mere showing that the parties are married may raise a presumption that the wife is legally entitled to be supported by the husband. State ex rel. Robison v. District Court, 56 M 592, 186 P 335; Goodwin v. Elm Orlu Min. Co. et al., 83 M 152, 159, 269 P 403.


Self-Sufficiency of Wife

Prior statements of self-sufficiency by the wife do not operate as a perpetual release of the husband's duty and responsibility to care for his wife and family. Murphy v. Murphy, 134 M 594, 335 P 2d 296, 297.

References

Cited or applied as section 3692, Revised Codes, in State ex rel. Robison v. District Court et al., 56 M 592, 186 P 335; Giebler v. Giebler, 69 M 347, 352, 222 P 436; In re Mahaffay's Estate, 79 M 10, 17, 18, 254 P 875; Yates v. Commercial Bank & Trust Co. et al., 79 M 100, 107, 255 P 8; Betor v. National Biscuit Co., 85 M 481, 488, 280 P 641; Conley v. Conley, 92 M 425, 433, 15 P 2d 922; Bingham v. National Bank of Montana, 105 M 159, 167, 72 P 2d 90; Tabor v. Industrial Acc. Fund, 126 M 240, 247 P 2d 472, 474, 475.

Collateral References

Husband and Wife  4.
41 C.J.S. Husband and Wife §§ 15, 16.
26 Am. Jur. 934, Husband and Wife, §§ 337 et seq.

Funeral expenses, husband's right of recovery at common law from tortfeasor causing wife's death. 3 ALR 2d 936.

Gift or other voluntary transfer by husband as fraud on wife. 49 ALR 2d 521.

Husband's liability to third person for necessities furnished wife separated from him. 60 ALR 2d 7.

Exclusion from Dwelling during Divorce Action

In a divorce action, under the facts of the case, the husband could not lawfully be excluded from the family dwelling.

Emery v. Emery, 122 M 201, 200 P 2d 251, 266.

References

Crowley et al. v. Rorvig, 61 M 245, 203 P 496; In re Mahaffay's Estate, 79 M 10, 17, 18, 254 P 875; Murray Hospital v. Angrove, 92 M 101, 107, 10 P 2d 577; In re Marsh's Estate, 125 M 239, 234 P 2d 459, 462.

Collateral References

Husband and Wife \S 1, 6, 8.
41 C.J.S. Husband and Wife $\S\S$ 4, 18, 21.
26 Am. Jur. 663, Husband and Wife, $\S\S$ 34-125.

36-105. (5786) Husband and wife may make contracts. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might, if unmarried, subject in transactions between themselves to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the provisions of this code relative to trusts.

History: En. Sec. 214, Civ. C. 1895; re-en. Sec. 3694, Rev. C. 1907; re-en. Sec. 5786, R. C. M. 1921. Cal. Civ. C. Sec. 158. Field Civ. C. Sec. 79.

Cross-References

Acknowledgments by married women, secs. 39-108, 39-109, 39-111, 39-113, 67-1603.

Corporate dividends may be received by married woman, sec. 15-604.

Transfers of corporate stock by married woman valid, sec. 15-604.

Contract of Separation

Under this section and the next two succeeding, husband and wife may agree, in writing, to an immediate separation, making provision for the support of either of them, the mutual consent of the parties being a sufficient consideration; and, if it is fairly made and executed, free from fraud or imposition, coercion, or duress, courts will uphold and enforce such an agreement. Lee v. Lee, 55 M 426, 431, 178 P 173.

Conveyances between Husband and Wife

While transfers of property by a husband to his wife should when charged as being fraudulent be very closely scrutinized on account of the opportunities afforded by the confidential relation of the parties for the perpetration of fraud, yet a husband honestly indebted to his wife may give her a valid preference, either by transfer of money or property in payment, or by giving security to the same extent as he may prefer any other creditor, and such a preference is not of itself fraudulent as to other creditors of the husband. Lambrecht v. Patten, 15 M 260, 38 P 1063; Koopman v. Mansolf, 51 M 48, 149 P 491; Harrison v. Riddell et al., 64 M 466, 479, 210 P 460.

Where a wife's intention to convey property owned by her in her own right to an only daughter was, through the influence

of the husband made possible by reason of the confidential relations between them, so changed as to cause her to convey to him instead, upon his promise to make a will devising such property, as well as his own, to the daughter and a son in equal shares, which promise was after the wife's death broken and the will, theretofore made, destroyed, the husband was rightfully declared an involuntary trustee of the property, in favor of the daughter, the intended beneficiary. Huffine v. Lincoln, 52 M 585, 593, 160 P 820.

Where under a contract made by defendant landowner with plaintiffs (two individuals and a corporation) jointly, which authorized them to sell his property at a fixed price on a commission basis, a sale made to four persons, two of whom were the wives of the individual plaintiffs, was voidable at defendant's option, the fact that the two other purchasers bore no relation whatever to such plaintiffs not altering the rule condemning the sale. Crowley et al. v. Rorvig, 61 M 245, 203 P 496.

In an action in conversion of personal property seized under attachment, in which defendants alleged that the property seized belonged to the plaintiff's husband, that she and he had conspired to defraud his creditors and for that purpose the husband had fraudulently transferred his property to plaintiff who paid no consideration therefor, and that other property had been purchased by her with the husband's money, the verdict in plaintiff's favor was supported by the evidence. Yates v. Commercial Bank & Trust Co. et al., 79 M 100, 107, 255 P 8.

Purpose of Act

The primary purpose of the Married Women's Act (secs. 36-101 to 36-131) was to free the wife from certain disabilities imposed upon her by the common law, under which her legal personality and property were merged in the husband, i.

e., to place the wife upon an equal footing with the husband as to the ownership, control and enjoyment of property, as to contractual rights in general, with an equal right to resort to the courts, nothing appearing therein to disturb the marital unity otherwise. *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922.

Tort Actions

The common-law doctrine under which one spouse may not sue the other for a personal tort is in force in Montana, and therefore, the complaint of a wife against her husband for damages resultant from personal injuries sustained by reason of the alleged negligence of defendant's chauffeur while plaintiff was riding in defendant's car, was vulnerable to a demurrer. *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922.

References

Cited or applied as section 3694, Revised Codes, in *Marcellus v. Wright*, 51 M 559, 564, 154 P 714; *State ex rel. Robison*

v. District Court et al., 56 M 592, 186 P 335; *In re Mahaffay's Estate*, 79 M 10, 17, 18, 254 P 875; *State ex rel. Towne v. District Court*, 114 M 1, 7, 132 P 2d 161; *Emery v. Emery*, 122 M 201, 20 P 2d 251, 263.

Collateral References

Husband and Wife—36, 68.

41 C.J.S. *Husband and Wife* §§ 120, 194.

26 Am. Jur., *Husband and Wife*, p. 752, §§ 126 et seq.; p. 858, §§ 252 et seq.

Validity of partnership agreement between husband and wife. 20 ALR 1304.

Gift of services or labor to wife as fraud on husband's creditors. 28 ALR 1048.

Part performance of oral contract to convey predicated upon possession or improvement by one spouse of real property of other. 74 ALR 218.

Post-mortem payment or performance, validity of post-nuptial contract as affected by provision for. 1 ALR 2d 1262.

36-106. (5787) Extent to which their legal relation may be altered by contract—separation agreement. A husband and wife cannot, by any contract with each other, alter their legal relation, except as to property and except that they may agree, in writing, to an immediate separation, and may make provision for the support of either of them and of their children during such separation.

History: En. Sec. 215, Civ. C. 1895; re-en. Sec. 3695, Rev. C. 1907; re-en. Sec. 5787, R. C. M. 1921. Cal. Civ. C. Sec. 159. Based on Field Civ. C. Sec. 80.

Agreement Must Be in Writing

An agreement between husband and wife providing for a property settlement between them must, under this section, be in writing. *Clary v. Fleming*, 60 M 246, 249, 198 P 546.

Agreement No Bar to Divorce

An agreement by husband and wife for immediate separation, making provision for the support of either and of their children, authorized by this section, if fairly made and executed and free from fraud or imposition, coercion or duress, will be enforced, and is not ordinarily a bar to an action for divorce for cause then existing or arising subsequently thereto, in the absence of a covenant, express or implied, not to sue for past offenses. *Sherman v. Sherman*, 65 M 227, 229, 211 P 321.

Attachment Lies Where Obligations Contractual and Not Decretal

Where the court approved a property settlement contract entered into during the pendency of a divorce action, and de-

fendant ceased payments on the agreed \$150 per month support money when the minor child reached majority, the rights and obligations of the parties were contractual and not decretal and therefore attachment lay, against his contention that the sum payable was not for a certain sum; such agreements regulate the rights and obligations inter sese, and his remedy was for reformation of the agreement, until which time the contract must stand. *State ex rel. Towne v. District Court*, 114 M 1, 3, 132 P 2d 161.

Burden of Proof as to Compliance with Provisions

Where the husband, on application by his wife for temporary alimony pending determination of an action for divorce, relied upon a separation agreement as a bar to her right to relief, the burden rested upon him to allege and prove that the agreement complied in all respects with this section. *State ex rel. Robison v. District Court et al.*, 56 M 592, 186 P 335.

Collusion

An agreement between husband and wife, whereby the latter promised to convey a lot to the former in consideration of his failure to fight a divorce action in-

stituted by her, was collusive and void as against public policy. *Clary v. Fleming*, 60 M 246, 198 P 546.

An agreement between husband and wife for immediate separation and providing for support of the parties and their children, entered into with the intent of bringing about or facilitating a divorce, is void. *Sherman v. Sherman*, 65 M 227, 229, 211 P 321.

Effect of Contract

It is the duty of the court to enforce a contract, even though the complaining party may have made a bad bargain. *Viers v. Webb*, 76 M 38, 41, 245 P 257.

Where under a separation agreement the wife accepted certain real property in full satisfaction of her rights in the property of the husband, and the latter granted her permission to use household furniture owned by him until he should want it, the transaction constituted a bailment for the benefit of the wife for an indefinite period—a loan within the meaning of section 47-101. *Viers v. Webb*, 76 M 38, 41, 245 P 257.

Essentials of Contracts Generally

Tested by the rules of the common law, an agreement between husband and wife providing for a separation, an adjustment of their respective interests in property and for the support of the wife, is valid only when it is to take effect at once and is immediately complied with, and when the marital relations are of such a character as to render a separation necessary for the health or happiness of one or the other. *Stebbins v. Morris*, 19 M 115, 120, 122, 47 P 642. See *State ex rel. Giroux v. Giroux*, 19 M 149, 158, 47 P 798; *Lee v. Lee*, 55 M 426, 433, 178 P 173.

An agreement between husband and wife whereby the former is absolved from the legal obligation to support the latter should, in the absence of a compliance with the provisions of this section, be held void as against public policy. *State ex rel. Robison v. District Court et al.*, 56 M 592, 186 P 335.

Remedy is Reformation Where Contract Does Not Provide for Modifications

Where a contract entered into between husband and wife pending divorce suit,

approved by the court, provided for modification upon remarriage of the wife, but nothing was said as to modification in payments upon the daughter reaching the age of majority, the latter matter can be cured only by an appropriate action in equity for reformation or some other suitable proceeding to obtain suitable adjustment, until which time the contract is one for a sum certain and therefore attachment lies. *State ex rel. Towne v. District Court*, 114 M 1, 8, 132 P 2d 161.

Successive Suits on Delinquent Alimony Installments

There is nothing in section 93-8704, nor in any other section of the codes, to prevent the bringing of successive suits for recovery of delinquent alimony installments fixed by an agreement between the parties, in different departments of the same court. *State ex rel. Towne v. District Court*, 114 M 1, 25, 132 P 2d 161.

Void Provisions

Provision of antenuptial agreement that, in event either party shall institute divorce action, covenants to pay all expenses, and covenants that other party shall never be called on to pay alimony, separate maintenance, costs of suit, or any other expense incurred by party bringing action, is contrary to public policy and void, and court was justified in awarding alimony and suit money to wife instituting divorce action. *Stefonick v. Stefonick*, 118 M 486, 167 P 2d 848, 854, 164 ALR 1211.

References

Conley v. Conley, 92 M 425, 434, 15 P 2d 922; *Murphy v. Murphy*, 134 M 594, 335 P 2d 296, 297.

Collateral References

Husband and Wife § 36, 277, 278.
41 C.J.S. *Husband and Wife* § 120; 42 C.J.S. *Husband and Wife* § 593.

Spouse's right to take under other spouse's will as affected by post-nuptial agreement or property settlement. 53 ALR 2d 475.

Husband's liability to third person for necessities furnished wife separated from him. 60 ALR 2d 7.

36-107. (5788) Consideration for separation. The mutual consent of the parties is a sufficient consideration for such an agreement as mentioned in the last section.

History: En. Sec. 216, Civ. C. 1895; re-en. Sec. 3696, Rev. C. 1907; re-en. Sec. 5788, E. C. M. 1921. Cal. Civ. C. Sec. 160. Field Civ. C. Sec. 81.

References

Cited or applied as section 216, Civil Code, in *Stebbins v. Morris*, 19 M 115, 118, 47 P 642; as section 3696, Revised Codes,

in *Lee v. Lee*, 55 M 426, 431, 178 P 173; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922; *State ex rel. Towne v. District Court*, 114 M 1, 7, 132 P 2d 161.

Collateral References

Husband and Wife 278(5).
42 C.J.S. *Husband and Wife* § 596.

36-108. (5789) May be joint tenants. A husband and wife may hold real or personal property together, jointly or in common.

History: En. Sec. 217, Civ. C. 1895; re-en. Sec. 3697, Rev. C. 1907; re-en. Sec. 5789, R. C. M. 1921. Cal. Civ. C. Sec. 161. Field Civ. C. Sec. 82.

References

In re *Mahaffay's Estate*, 79 M 10, 18, 254 P 875; *Conley v. Conley*, 92 M 425, 434, 15 P 2d 922; *Emery v. Emery*, 122 M 201, 200 P 2d 251, 263; *Shaw v. Shaw*, 122 M 593, 208 P 2d 514, 524; In re *Marsh's Estate*, 125 M 239, 234 P 2d 459, 461.

Collateral References

Husband and Wife 14.
41 C.J.S. *Husband and Wife* § 33.

Creation of right of survivorship by instrument ineffective to create estate by entireties. 1 ALR 2d 247.

Validity and effect of conveyance by one spouse to other of grantor's interest in property held as estate by entireties. 8 ALR 2d 634.

Felonious killing of one tenant by the entireties by the other as affecting latter's rights in the property. 32 ALR 2d 1099.

Rights and incidents where real property purchased with wife's funds is placed in spouses' joint names. 43 ALR 2d 917.

Character of tenancy created by owner's conveyance to himself and another, or to another alone of an undivided interest. 44 ALR 2d 595.

Accountability of tenant by entirety for rents and profits for use and occupation. 51 ALR 2d 399.

Estate by entirety in personal property. 64 ALR 2d 8.

Estate by entirety in derivative of entirety property. 64 ALR 2d 57.

Interest of spouse in estate by entireties as subject to encumbrance and satisfaction of his or her individual debts. 75 ALR 2d 1172.

Right of surviving spouse to exoneration or other reimbursement out of decedent's estate respecting lien on estate by entirety. 76 ALR 2d 1004.

36-109. (5790) Liability for acts or debts of each other. Neither husband nor wife, as such, is answerable for the acts of the other, or liable for the debts contracted by the other; provided, however, that the expenses for necessities of the family and of the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately.

History: En. Sec. 218, Civ. C. 1895; re-en. Sec. 3698, Rev. C. 1907; amd. Sec. 1, Ch. 129, L. 1915; re-en. Sec. 5790, R. C. M. 1921.

College Education of Children

Application of wife for modification of divorce decree to compel defendant father to contribute \$35.00 per month toward minor son's expenses in attending college was properly granted, since this section makes education of the child the responsibility of both parents and extends to college education of a child. Refer v. Refer, 102 M 121, 129, 56 P 2d 750.

Divorce Court Powers

A court which severs the marriage ties by granting a divorce possesses the necessary power to compel the ex-husband to support his minor children. *State ex rel. Lay v. District Court*, 122 M 61, 198 P 2d 761, 767.

Joinder of Spouses in Action

Joining of husband and wife by collection agency in all actions where a claim against either was involved, although the facts in nowise justified the practice under this section or the necessity of life theory, at least amounted to sharp practice. *State ex rel. Freebourn v. Merchants' Credit Service, Inc.*, 104 M 76, 102, 66 P 2d 337.

References

In re *Mahaffay's Estate*, 79 M 10, 18, 254 P 875; *Yates v. Commercial Bank & Trust Co. et al.*, 79 M 100, 107, 255 P 8; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922; *Bingham v. National Bank of Montana*, 105 M 159, 167, 72 P 2d 90.

Collateral References

Husband and Wife 19-25.
41 C.J.S. *Husband and Wife* §§ 50-66.
26 Am. Jur. 928, *Husband and Wife*, §§ 329-336; 27 Am. Jur. 73, *Husband and Wife*, §§ 476-490.

Personal tort liability of spouse. 10 ALR 2d 988.

Authority to borrow money on spouse's credit. 55 ALR 2d 1215.

36-110. (5791) Married women may prosecute actions. A married woman in her own name may prosecute action for injuries to her reputation, person, property, and character, or for the enforcement of any legal or equitable right, and may in like manner defend any action brought against herself.

History: En. Sec. 219, Civ. C. 1895; re-en. Sec. 3699, Rev. C. 1907; re-en. Sec. 5791, R. C. M. 1921.

Action against Husband

Held, that neither this section, nor section 36-128, declaring that a married woman may sue and be sued in the same manner as if she were single, when read in connection with other sections of the Married Women's Act, confers upon the wife the right to sue her husband for a personal tort, a right denied to her under the common law. *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922; *Kelly v. Williams*, 94 M 19, 21 P 2d 58.

36-111. (5792) Separate property of wife. All the property of the wife owned before her marriage and that acquired afterwards is her separate property. The wife may, without consent, agreement and signature of her husband, convey and transfer her separate property, real or personal, including the fee simple title to real property or execute a power of attorney for the conveyance and transfer thereof.

History: En. Sec. 220, Civ. C. 1895; re-en. Sec. 3700, Rev. C. 1907; re-en. Sec. 5792, R. C. M. 1921; amd. Sec. 1, Ch. 63, L. 1923. Cal. Civ. C. Sec. 162.

References

Isom v. Larson, 78 M 395, 255 P 1049; *In re Mahaffay's Estate*, 79 M 10, 21, 254 P 875; *Conley v. Conley*, 92 M 425, 433, 12 P 2d 922; *Emery v. Emery*, 122 M 201, 200 P 2d 251, 263; *Shaw v. Shaw*, 122 M 593, 208 P 2d 514, 524; *Baird v. Baird*, 125 M 122, 232 P 2d 348, 354; *Battleson v. Commissioner of Internal Revenue*, 62 F 2d 125.

Collateral References

Husband and Wife ¶110-133½, 179-202.

36-112. (5793) Inventory of separate property of wife. A full and complete inventory of the separate personal property of the wife may be made out and signed by her, acknowledged or proved in the same manner required by law for the acknowledgment or proof of a grant of real property by an unmarried woman, and recorded in the office of the county clerk of the county in which the parties reside.

History: En. Sec. 221, Civ. C. 1895; re-en. Sec. 3701, Rev. C. 1907; re-en. Sec. 5793, R. C. M. 1921. Cal. Civ. C. Sec. 165.

References

In re Mahaffay's Estate, 79 M 10, 18, 254 P 875.

Collateral References

Husband and Wife ¶203.

41 C.J.S. *Husband and Wife* § 389.

Spouse's cause of action for negligent personal injury as separate or community property. 35 ALR 2d 1199.

Right of one spouse to maintain action against other for personal injury. 43 ALR 2d 632.

41 C.J.S. *Husband and Wife* §§ 226-277, 367-388.

26 Am. Jur. 663, *Husband and Wife*, §§ 34-54.

Oral promise of husband or wife as grantee to other as grantor as giving rise to trust. 35 ALR 311.

Part performance of oral contract to convey predicated upon possession or improvement by one spouse of real property of other. 74 ALR 218.

Profits from business operating on spouse's separate capital as community or separate property. 29 ALR 2d 530.

Dividends on corporate stock held as separate property, as separate or community property. 55 ALR 2d 960.

Filing before Marriage

A statute providing for the recording by a married woman of a list of her separate property, in order to exempt the same from

liability for her husband's debts, is substantially complied with though such list be recorded by a woman in her maiden name, provided it contains a notification of her approaching marriage and the name of her intended husband. *Palmer v. Murray*, 6 M 125, 128, 9 P 896. See *Palmer v. Murray*, 8 M 174, 19 P 553.

Necessity for Inventory

The inventory of the separate property of the wife is necessary to protect such property only when it is in the exclusive possession of the husband, and third persons deal with him on the credit thereof without knowledge of the claim of the wife. *Chan v. Slater*, 33 M 155, 165, 82 P 657.

Recording as Constructive Notice

Evidence in an action for the conversion

36-113. (5794) Effect of filing inventory. The filing of the inventory in the clerk's office is notice and prima facie evidence of the title of the wife.

History: En. Sec. 222, Civ. C. 1895; re-en. Sec. 3702, Rev. C. 1907; re-en. Sec. 5794, R. C. M. 1921. Cal. Civ. C. Sec. 166.

References

Cited or applied as section 222, Civil

36-114. (5795) Earnings and accumulations of wife. The earnings and accumulations of the wife are not liable for the debts of the husband.

History: En. Sec. 223, Civ. C. 1895; re-en. Sec. 3703, Rev. C. 1907; re-en. Sec. 5795, R. C. M. 1921. Cal. Civ. C. Sec. 168.

After-Acquired Property

Property acquired by the wife subsequent to the contracting of a debt by the husband cannot be held liable for such debt. *Chan v. Slater*, 33 M 155, 166, 82 P 657.

36-115. (5796) Same, when separated. The earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife.

History: En. Sec. 224, Civ. C. 1895; re-en. Sec. 3704, Rev. C. 1907; re-en. Sec. 5796, R. C. M. 1921. Cal. Civ. C. Sec. 169.

References

Cited or applied as section 224, Civil Code, in *Chan v. Slater*, 33 M 155, 164, 82 P 657; In re *Mahaffay's Estate*, 79 M

of restaurant fixtures claimed by the wife of a judgment debtor as her separate property and seized by the attaching creditor with constructive notice of plaintiff's claim by reason of an inventory filed by her under section 36-113, over plaintiff's protests and objections, thus destroying a prosperous business in an effort to coerce her to pay her husband's debt, was sufficient to warrant an award of exemplary damages. *Wray v. Great Falls Paper Co.*, 72 M 461, 468, 234 P 486.

References

Yates v. Commercial Bank & Trust Co. et al., 79 M 100, 108, 255 P 8; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922.

Collateral References

Husband and Wife ¶149(1).
41 C.J.S. *Husband and Wife* § 307.

Codè, in *Chan v. Slater*, 33 M 155, 164, 165, 82 P 657; *Wray v. Great Falls Paper Co.*, 72 M 461, 468, 234 P 486; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922.

References

In re *Mahaffay's Estate*, 79 M 11, 18, 254 P 875; *Yates v. Commercial Bank & Trust Co.*, 79 M 100, 107, 255 P 8; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922.

Collateral References

Husband and Wife ¶149.
41 C.J.S. *Husband and Wife* § 307.
27 Am. Jur. 61, *Husband and Wife*, §§ 463 et seq.

11, 18, 254 P 875; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922.

Collateral References

Husband and Wife ¶126.
41 C.J.S. *Husband and Wife* § 258.
27 Am. Jur. 65, *Husband and Wife*, § 467.

36-116. (5797) Work and labor of wife. All work and labor performed by a married woman for a person other than her husband and children shall, unless there is a written agreement on her part to the contrary, be presumed to be performed on her separate account.

History: En. Sec. 1442, 5th Div. Comp. Stat. 1887; re-en. Sec. 225, Civ. C. 1895; re-en. Sec. 3705, Rev. C. 1907; re-en. Sec. 5797, R. C. M. 1921.

Amount of Compensation

A married woman, who works for a corporation with the permission of its officers, may recover such compensation for her services as they are reasonably worth. *Trogon v. Hanson Sheep Co.*, 49 M 1, 6, 139 P 792.

Duty to Serve Husband

The common-law rule that the wife owes the duty to the husband to attend to all ordinary household duties and labor in the advancement of the husband's interests without compensation was not changed, but is recognized, by this section, in providing that all work and labor performed by a married woman for a person other than her husband and children is presumed to be performed for her own account. *Gates v. Powell*, 77 M 554, 562, 252 P 377.

36-117. (5798) Debts of wife contracted before marriage. The property of the husband is not liable for the debts of the wife contracted before marriage.

History: En. Sec. 226, Civ. C. 1895; re-en. Sec. 3706, Rev. C. 1907; re-en. Sec. 5798, R. C. M. 1921. Cal. Civ. C. Sec. 170.

References

Conley v. Conley, 92 M 425, 433, 15 P 2d 922.

Collateral References

Husband and Wife—18.

36-118. (5799) Separate property of wife—how far liable. The separate property of the wife shall be exempt from all debts and liabilities of the husband, unless for necessary articles procured for the use and benefit of herself and her children under the age of eighteen years, but such exemption shall extend only to such property of such wife as shall be mentioned in an inventory thereof, as provided in sections 36-112 and 36-113. And in no case shall any of the separate property of the wife be liable for the debts of the husband, unless such property is in the sole and exclusive possession of the husband, and then only to such persons as deal with the husband in good faith on the credit of such property, without knowledge or notice that the property belongs to the wife. But the separate property of the wife is liable for her own debts, contracted before or after marriage.

History: Ap. p. Sec. 1, p. 369, Bannack Stat.; re-en. Sec. 1, p. 521, Cod. Stat. 1871; re-en. Sec. 866, 5th Div. Rev. Stat. 1879; re-en. Sec. 1432, 5th Div. Comp. Stat. 1887; amd. Sec. 227, Civ. C. 1895; re-en. Sec. 3707, Rev. C. 1907; re-en. Sec. 5799, R. C. M. 1921. Cal. Civ. C. Sec. 171.

Curtesy

A section of the Compiled Statutes of

Recovery for Loss of Time

A married woman is entitled to recover damages for the impairment of her ability to work, independently of the husband's right to recover for the loss of her time. *Risken v. Northern Pac. Ry. Co.*, — M —, 350 P 2d 831, 840.

References

Cited or applied as section 225, Civil Code, in *Chan v. Slater*, 33 M 155, 164, 82 P 657; In re *Mahaffay's Estate*, 79 M 11, 18, 254 P 875; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922; *Stefonick v. Stefonick*, 118 M 486, 167 P 2d 848, 855, 164 ALR 1211; In re *Marsh's Estate*, 125 M 239, 234 P 2d 459, 462.

Collateral References

Husband and Wife—131(6).
41 C.J.S. Husband and Wife § 273.
27 Am. Jur. 61, Husband and Wife, §§ 463 et seq.

41 C.J.S. Husband and Wife §§ 47-49, 331.
26 Am. Jur. 930, Husband and Wife, §§ 333-336.

Marriage as extinguishing contractual indebtedness between parties. 45 ALR 2d 722.

1887 somewhat similar to the above freed the duly listed property of a married woman from debts and liabilities of the husband, unless contracted for necessary articles for the wife and minor children, but did not give a married woman, in reference to such property, complete status as a femme sole, and did not deprive a husband of curtesy in such property. *Allen v. Roush*, 15 M 446, 449, 39 P 459.

Instructions to Jury

In an action by wife for conversion of her separate property by means of a levy of execution instruction that if jury found she actually owned the property, verdict should go in her favor was not erroneous as against contention it failed to advise jury as to a creditor's right to levy on it for husband's debt where creditor misled to believing it belonged to her husband. *Brennan v. Mayo*, 100 M 439, 446, 50 P 2d 245.

Pleadings

If a sale of personal property is sufficient to pass title from the husband to the wife, as between themselves, the property actually becomes the separate property of the wife. *Webster v. Sherman*, 33 M 448, 457, 84 P 878.

Where it does not appear in a complaint or otherwise in an action against a husband and wife on an account stated that the articles were of the character men-

tioned in this section, for which the separate property of the wife would be liable, no account was stated as to her and a judgment against her was unwarranted. *O'Hanlon Co. v. Jess*, 58 M 415, 419, 193 P 65.

References

Cited or applied as section 227, Civil Code, in *Chan v. Slater*, 33 M 155, 165, 82 P 657; *Wray v. Great Falls Paper Co.*, 72 M 461, 468, 234 P 486; *Yates v. Commercial Bank & Trust Co. et al.*, 79 M 100, 108, 255 P 8; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922; *Bingham v. National Bank of Montana*, 105 M 159, 167, 72 P 2d 90; *Beard v. Myers*, — M —, 347 P 2d 719, 720.

Collateral References

Husband and Wife—146½-178.
41 C.J.S. *Husband and Wife* §§ 305-366.
26 Am. Jur. 933, *Husband and Wife*, § 336.

36-119. (5800) Support of wife. If the husband neglect to make adequate provision for the support of his wife, except in the cases mentioned in the next section, any other person may in good faith supply her with articles necessary for her support and recover the reasonable value thereof from her husband.

History: En. Sec. 244, Civ. C. 1895; re-en. Sec. 3724, Rev. C. 1907; re-en. Sec. 5800, R. C. M. 1921. Cal. Civ. C. Sec. 174. Field Civ. C. Sec. 84.

Attachment

An action for attorney fees in a divorce action is not maintainable under this section, impliedly conferring authority upon the wife to charge her husband, as his agent, for the value of articles necessary for her support, a divorce not being a "necessary" as that term is employed in this section. *Grimstad et al. v. Johnson et al.*, 61 M 19, 22 et seq., 201 P 314.

Contracts made by the wife for necessities under authority of this section, where the husband fails or refuses to furnish them, are his contracts and the obligations arising thereunder are his obligations; the agency referred to above is statutory but the husband's obligations are contractual; therefore attachment may issue in an action to recover for necessities furnished the wife as upon contracts "express or implied, for the direct payment of money" within the meaning

of section 93-4301. *McQuay et al. v. McQuay*, 86 M 535, 284 P 532.

Medical Services

Claims against defendant to recover the reasonable value of medical and surgical attention and hospital care provided for his wife during her last illness, were based upon contracts for the direct payment of money, authorizing attachment of funds belonging to defendant. *McQuay et al. v. McQuay*, 86 M 535, 284 P 532. (Mr. Justice Angstman, dissenting.)

References

Cited or applied as section 244, Civil Code, in *Dahlman v. Dahlman*, 28 M 373, 374, 72 P 748; *State ex rel. La Point v. District Court*, 69 M 29, 37, 220 P 88; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922.

Collateral References

Husband and Wife—19.
41 C.J.S. *Husband and Wife* §§ 50-64.
26 Am. Jur. 934, *Husband and Wife*, §§ 337 et seq.

36-120. (5801) Husband not liable when abandoned by wife. A husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified, by his misconduct, in abandoning him; nor is he liable for her support when she is living separate from him by agreement, unless such support is stipulated in the agreement.

History: En. Sec. 245, Civ. C. 1895; re-en. Sec. 3725, Rev. C. 1907; re-en. Sec. 5801, R. C. M. 1921. Cal. Civ. C. Sec. 175. Based on Field Civ. C. Sec. 85.

Grounds for Abandonment

A mere showing that parties are married may raise a presumption that the wife is legally entitled to be supported by the husband, but where she was and had been for four years living apart from him and had refused to return to the home provided by him because he declined to also receive as a member of the household her son by a former marriage who was capable of caring for himself, which the husband was not required to do under section 61-117, her refusal was unreason-

able and constituted desertion on her part, and under this section he was not liable for her support. *Goodwin v. Elm Orlu Min. Co. et al.*, 83 M 152, 161, 269 P 403.

References

Grimstad et al. v. Johnson et al., 61 M 18, 24, 201 P 314; *McQuay et al. v. McQuay*, 86 M 535, 284 P 532; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922; *Murphy v. Murphy*, 134 M 594, 335 P 2d 296, 298.

Collateral References

Husband and Wife ¶4, 279.
41 C.J.S. *Husband and Wife* §§ 15, 598.
26 Am. Jur. 939, *Husband and Wife*, § 340.

36-121. (5802) When wife must support husband. The wife must support the husband, when he has not deserted her, out of her separate property, when he has no separate property, and he is unable, from infirmity, to support himself.

History: En. Sec. 246, Civ. C. 1895; re-en. Sec. 3726, Rev. C. 1907; re-en. Sec. 5802, R. C. M. 1921. Cal. Civ. C. Sec. 176.

References

Cited or applied as section 3726, Revised Codes, in *Mennell v. Wells*, 51 M 141, 148, 149 P 954; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922.

Collateral References

Husband and Wife ¶4.
41 C.J.S. *Husband and Wife* § 16.
26 Am. Jur. 940, *Husband and Wife*, § 341.

Right of wife to recover in individual capacity for medical expenses of husband injured by third person's negligence. 42 ALR 2d 843.

36-122. (5803) Rights of husband and wife—how governed. The property rights of the husband and wife are governed by this chapter, unless there is a marriage settlement containing stipulations contrary thereto.

History: En. Sec. 247, Civ. C. 1895; re-en. Sec. 3727, Rev. C. 1907; re-en. Sec. 5803, R. C. M. 1921. Cal. Civ. C. Sec. 177.

References

Gates v. Powell, 77 M 554, 562, 252 P 377; *Conley v. Conley*, 92 M 425, 433, 15 P 2d 922.

Collateral References

Husband and Wife ¶31.
41 C.J.S. *Husband and Wife* § 99.
Spouse's right to take under other

spouse's will as affected by antenuptial agreement or property settlement. 53 ALR 2d 475.

Validity, construction and effect of provision in antenuptial contract forfeiting property rights of innocent spouse on separation or filing divorce or other matrimonial action. 57 ALR 2d 942.

Operation and effect of antenuptial agreement to waive or bar surviving spouse's right to probate homestead or surviving family's similar homestead right or exemption. 65 ALR 2d 727.

36-123. (5804) Marriage settlement contracts—how executed. All contracts for marriage settlements must be in writing, and executed and acknowledged or proved in like manner as a grant of land is required to be executed and acknowledged or proved.

History: En. Sec. 248, Civ. C. 1895; re-en. Sec. 3728, Rev. C. 1907; re-en. Sec. 5804, R. C. M. 1921. Cal. Civ. C. Sec. 178.

References

Stefonick v. Stefonick, 118 M 486, 167 P 2d 848, 853, 164 ALR 1211; *Zier v. Osten*, 135 M 484, 342 P 2d 1076.

Collateral References

Husband and Wife ¶29(7), 30.
41 C.J.S. *Husband and Wife* §§ 86, 90.
26 Am. Jur. 881, *Husband and Wife*, §§ 274 et seq.

Setting aside antenuptial contract or marriage settlement on ground of failure

of spouse to make proper disclosure of property owned. 27 ALR 883.

Validity of antenuptial contract as affected by provision for post-mortem payment or performance. 1 ALR 2d 1260.

36-124. (5805) To be acknowledged and recorded. When such contract is acknowledged or proved it must be recorded in the office of the county clerk of every county in which any real estate may be situated which is granted or affected by such contract.

History: En. Sec. 249, Civ. C. 1895; re-en. Sec. 3729, Rev. C. 1907; re-en. Sec. 5805, R. C. M. 1921. Cal. Civ. C. Sec. 179.

Collateral References

Husband and Wife \S 29(8), 30.
41 C.J.S. Husband and Wife \S 87, 90.

References

Stefonick v. Stefonick, 118 M 486, 167 P 2d 842, 853, 164 ALR 1211.

36-125. (5806) Effect of recording. The recording or nonrecording of such contract has a like effect as the recording or nonrecording of a grant of real property.

History: En. Sec. 250, Civ. C. 1895; re-en. Sec. 3730, Rev. C. 1907; re-en. Sec. 5806, R. C. M. 1921. Cal. Civ. C. Sec. 180.

References

Stefonick v. Stefonick, 118 M 486, 167 P 2d 848, 853, 164 ALR 1211; Zier v. Osten, 135 M 844, 342 P 2d 1076.

36-126. (5807) Minors may make marriage settlement. A minor capable of contracting marriage may make a valid marriage settlement, as herein provided.

History: En. Sec. 251, Civ. C. 1895; re-en. Sec. 3731, Rev. C. 1907; re-en. Sec. 5807, R. C. M. 1921. Cal. Civ. C. Sec. 181.

Collateral References

Husband and Wife \S 26.
41 C.J.S. Husband and Wife \S 75.
26 Am. Jur. 883, Husband and Wife, \S 276.

36-127. (5808) Married woman may act as executrix, guardian or trustee. A married woman may be an executrix, administratrix, guardian, or trustee, and may bind herself and the estate she represents without any act or assent on the part of her husband.

History: En. Sec. 1443, 5th Div. Comp. Stat. 1887; re-en. Sec. 252, Civ. C. 1895; re-en. Sec. 3733, Rev. C. 1907; re-en. Sec. 5808, R. C. M. 1921.

Married woman may be guardian, sec. 91-4605.

Collateral References

Husband and Wife \S 55, 59.
41 C.J.S. Husband and Wife \S 6, 166, 172, 175.

Cross-References

Married woman may be administratrix, sec. 91-1406.

36-128. (5809) May sue and be sued. A married woman may sue and be sued in the same manner as if she were sole.

History: En. Sec. 1144, 5th Div. Comp. Stat. 1887; re-en. Sec. 253, Civ. C. 1895; re-en. Sec. 3733, Rev. C. 1907; re-en. Sec. 5809, R. C. M. 1921.

Actions against Husband

Neither section 36-110, granting the right to a married woman to prosecute actions for injury to person, property, etc., in her own name, nor this section, when read in connection with other sections of the Married Women's Act, confers upon the wife the right to sue her husband for a personal tort, a right denied her under the common law. Conley v. Conley, 92 M 425, 433, 15 P 2d 922; Kelly v. Williams, 94 M 19, 21 P 2d 58.

Cross-References

Judgments for or against married women, sec. 93-4707.

Married women may sue and be sued, sec. 93-2803.

Wife may defend action in own right, sec. 93-2804.

References

Emery v. Emery, 122 M 201, 200 P 2d 251, 263.

Collateral References

Husband and Wife 203.
41 C.J.S. Husband and Wife § 389.

Right of one spouse to maintain an action against the other for assault and battery. 6 ALR 1038.

Right of one spouse to maintain action against other for personal injury. 29 ALR 1482 and 43 ALR 2d 632.

Right of husband or wife to maintain replevin against other. 41 ALR 1054.

Action against husband or his estate for causing death of wife, or vice versa. 104 ALR 1271.

Conflict of laws as to right of action between husband and wife. 108 ALR 1126.

Right of one spouse to maintain action at law against other based on tort in respect of property for damages or recovery of possession. 109 ALR 882.

Public policy against actions between persons in relationship of husband and wife, as affecting action for injury to one against estate of other. 130 ALR 889.

Personal tort liability of spouse. 10 ALR 2d 988.

36-129. (5810) Liable for her own contracts. The contracts made by a married woman, in respect to her separate property, labor, or services, shall not be binding upon her husband, nor render him nor his property liable therefor; but she and her separate property shall be liable on such contracts in the same manner as if she were sole.

History: En. Sec. 1446, 5th Div. Comp. Stat. 1887; re-en. Sec. 254, Civ. C. 1895; re-en. Sec. 3734, Rev. C. 1907; re-en. Sec. 5810, R. C. M. 1921.

References

Conley v. Conley, 92 M 425, 433, 15 P 2d 922.

Collateral References

Husband and Wife 79.
41 C.J.S. Husband and Wife § 176.

Personal liability of married woman for domestic or household services. 36 ALR 392.

36-130. (5811) May make contracts. A married woman may make contracts, oral or written, sealed or unsealed, and may waive or relinquish any right or interest in any real estate, either in person or by attorney, in the same manner, to the same extent, and with the like effect as if she were a single woman.

History: En. Sec. 1448, 5th Div. Comp. Stat. 1887; re-en. Sec. 256, Civ. C. 1895; re-en. Sec. 3736, Rev. C. 1907; re-en. Sec. 5811, R. C. M. 1921.

Contracts with Husband

This section clothes the wife with liberty to contract with her husband as well as any other person; but their dealings with each other will in every case be closely scrutinized. Lambrecht v. Patten, 15 M 260, 266, 38 P 1063; Koopman v. Mansolf, 51 M 48, 54, 149 P 491.

Fraudulent Conveyances

The wife being competent to contract, obviously transactions between her and strangers stand upon the same footing as if she were single, and are not subject to the same scrutiny as those had with her husband. Where one attacked a conveyance of property to a married woman by a stranger, on the ground that the consideration had been paid by her husband, he had the burden of showing such fact, a mere suspicion that it was frau-

lent being insufficient to overturn it. Koopman v. Mansolf, 51 M 48, 55, 149 P 491.

Note and Mortgage

When a married woman joins her husband in the making of a note and mortgage she makes the debt her own and assumes a personal liability and she may not thereafter assert that in attaching her signature she merely did so for the purpose of hypothecating her inchoate right of dower in the mortgaged property, or that she signed because she was told to do so because she was the wife of the maker and mortgagor. Ferrell v. Elling, 84 M 384, 390, 276 P 432.

References

Cited or applied as section 1448, Fifth Division, Compiled Statutes of 1887, in Kennelly v. Savage, 18 M 119, 122, 44 P 400; Conley v. Conley, 92 M 425, 434, 15 P 2d 922; Emery v. Emery, 122 M 201, 200 P 2d 251, 263; Baird v. Baird, 125 M 122, 232 P 2d 348, 354; Battleson v.

Commissioner of Internal Revenue, 62 F
2d 125.

Collateral References

Husband and Wife \Rightarrow 69, 79.
41 C.J.S. Husband and Wife §§ 176, 196.

36-131. (5812) Tenancy by curtesy not allowed. No estate is allowed the husband as tenant by curtesy upon the death of his wife.

History: En. Sec. 257, Civ. C. 1895;
re-en. Sec. 3737, Rev. C. 1907; re-en. Sec.
5812, R. C. M. 1921. Cal. Civ. C. Sec. 173.

M 559, 564, 154 P 714; In re Mahaffay's
Estate, 79 M 10, 18, 254 P 875; Conley
v. Conley, 92 M 425, 433, 15 P 2d 922.

References

Cited or applied as section 3737, Re-
vised Codes, in Marcellus v. Wright, 51

Collateral References

Curtesy \Rightarrow 2.
25 C.J.S. Curtesy § 2.
15 Am. Jur. 272, Curtesy, §§ 5 et seq.

TITLE 37
INITIATIVE AND REFERENDUM

Chapter 1. Initiative and referendum, 37-101 to 37-110.

CHAPTER 1
INITIATIVE AND REFERENDUM

- Section 37-101. Form of petition for referendum.
37-102. Form of petition for initiative.
37-103. County clerk to verify signatures.
37-104. Notice to governor and proclamation.
37-105. Certification and numbering of measures—constitutional amendments.
37-106. Manner of voting—ballot.
37-107. Printing and distribution of measures.
37-108. Canvass of votes.
37-109. Who may petition—false signature—penalties.
37-110. Referred bills not effective until approved.

37-101. (99) Form of petition for referendum. The following shall be substantially the form of petition for the referendum to the people on any act passed by the legislative assembly of the state of Montana:

Warning.

Any person signing any name other than his own to this petition, or signing the same more than once for the same measure at one election, or who is not, at the time of signing the same, a legal voter of this state, is punishable by a fine of not exceeding five hundred dollars (\$500.00), or imprisonment in the penitentiary not exceeding two years, or by both such fine and imprisonment.

Petition for referendum.

To the Honorable, Secretary of State of the state of Montana:

We, the undersigned citizens and legal voters of the state of Montana, respectfully order that Senate (House) Bill Number, entitled (title of act), passed by the legislative assembly of the state of Montana, at the regular (special) session of said legislative assembly, shall be referred to the people of the state for their approval or rejection, at the regular, general, or special election to be held on the day of, 19...., and each for himself says: I have personally signed this petition; I am a legal voter of the state of Montana; and my residence, post-office address, and voting precinct are correctly written after my name.

Name Residence
Post-office address
If in city, street and number
Voting precinct

(Here follow numbered lines for signatures.)

History: En. Sec. 1, Ch. 62, L. 1907; Sec. 106, Rev. C. 1907; re-en. Sec. 99, R. C. M. 1921.

Cross-Reference

Initiative and referendum in cities and towns, secs. 11-1101 to 11-1114.

References

Sawyer Stores, Inc. v. Mitchell et al., 103 M 148, 154, 62 P 2d 342.

Collateral References

Statutes \Rightarrow 344.

82 C.J.S. Statutes § 122.

28 Am. Jur. 162, Initiative, Referendum, and Recall, §§ 18 et seq.

Inclusion in single initiative or referendum petition of proposed constitutional or statutory enactments covering different and distinct subjects. 90 ALR 572.

Construction and application of constitutional or statutory provisions expressly excepting certain laws from referendums. 146 ALR 284.

37-102. (100) Form of petition for initiative. The following shall be substantially the form of petition for any law of the state of Montana proposed by the initiative:

Warning.

Any person signing any name other than his own to this petition, or signing the same more than once for the same measure at one election, or who is not, at the time of signing the same, a legal voter of this state, is punishable by a fine not exceeding five hundred dollars (\$500.00), or imprisonment in the penitentiary not exceeding two years, or by both such fine and imprisonment.

Petition for Initiative.

To the Honorable _____, Secretary of State of the State of Montana:

We, the undersigned legal voters of the state of Montana, respectfully demand that the following proposed law shall be submitted to the legal electors of the state of Montana, for their approval or rejection, at the regular, general, or special election to be held on the _____ day of _____, 19____, and each for himself says:

I have personally signed this petition, and my residence, post-office address, and voting precinct are correctly written after my name.

Name _____ Residence _____

Post-office address _____

If in city, street and number _____

Voting precinct _____

(Numbered lines for names on each sheet.)

Every such sheet for petitioner's signature shall be attached to a full and correct copy of the title and text of the measure so proposed by initiative petition; but such petition may be filed with the secretary of state in numbered sections, for convenience in handling, and referendum petitions may be filed in sections in like manner.

History: En. Sec. 2, Ch. 62, L. 1907; Sec. 107, Rev. C. 1907; re-en. Sec. 100, R. C. M. 1921.

Attaching Title and Text Mandatory

This section requiring that the sheets provided for signatures shall be attached to a full and correct copy of the title and text thereof, must be held mandatory and

not directory, because its purpose is to advise signers as to the contents of the proposed law, especially where question of noncompliance is raised prior to election. Ford v. Mitchell, 103 M 99, 107, 61 P 2d 815.

Difference in Text of Petitions

Where two petitions differ substantially

in text of the proposed law, they could not be considered as parts of one petition for the purpose of the sufficiency of the number of signatures. *Ford v. Mitchell*, 103 M 99, 107, 61 P 2d 815.

References

State ex rel. *Bonner v. Dixon et al.*, 59 M 58, 91, 195 P 841; referred to as Sec. 107, R. C. M. 1907; *Sawyer Stores, Inc. v. Mitchell et al.*, 103 M 148, 154, 62 P 2d 342.

Collateral References

Statutes 304.
82 C.J.S. Statutes § 122.
28 Am. Jur. 162, Initiative, Referendum, and Recall, §§ 18 et seq.

Inclusion in single initiative or referendum petition of proposed constitutional or statutory enactments covering different and distinct subjects. 90 ALR 572.

37-103. (101) County clerk to verify signatures. The county clerk of each county in which any such petition shall be signed shall compare the signatures of the electors signing the same with their signatures on the registration books and blanks on file in his office, for the preceding general election, and shall thereupon attach to the sheets of said petition containing such signatures his certificate to the secretary of state, substantially as follows:

State of Montana, }
County of } ss.
To the Honorable, Secretary of State for Montana:
I,, county clerk of the county of, hereby certify that I have compared the signatures on (number of sheets) of the referendum (initiative) petition, attached hereto, with the signatures of said electors as they appear on the registration books and blanks in my office; and I believe that the signatures of (names of signers), numbering (number of genuine signatures), are genuine. As to the remainder of the signatures thereon, I believe that they are not genuine, for the reason that; and I further certify that the following names (.....) do not appear on the registration books and blanks in my office.
Signed:

....., County Clerk.
By
(Seal of Office) Deputy

Every such certificate shall be prima facie evidence of the facts stated therein, and of the qualifications of the electors whose signatures are thus certified to be genuine, and the secretary of state shall consider and count only such signatures on such petitions as shall be so certified by said county clerks to be genuine; provided, that the secretary of state may consider and count such of the remaining signatures as may be proved to be genuine, and that the parties so signing were legally qualified to sign such petitions, and the official certificate of a notary public of the county in which the signer resides shall be required as to the fact for each of such last-named signatures; and the secretary of state shall further compare and verify the official signatures and seals of all notaries so certifying

with their signatures and seals filed in his office. Such notaries' certificate shall be substantially in the following form:

State of Montana, }
County of } ss.

I,, a duly qualified and acting notary public in and for the above-named county and state, do hereby certify: that I am personally acquainted with each of the following named electors whose signatures are affixed to the annexed petition, and I know of my own knowledge that they are legal voters of the state of Montana, and of the county and precincts written after their several names in the annexed petition, and that their residence and post-office address is correctly stated therein, to wit: (Names of such electors.)

In Testimony Whereof, I have hereunto set my hand and official seal this day of, 19....

Notary Public, in and for County,
State of Montana.

The county clerk shall not retain in his possession any such petition, or any part thereof, for a longer period than two days for the first two hundred signatures thereon, and one additional day for each two hundred additional signatures, or fraction thereof, on the sheets presented to him, and at the expiration of such time he shall forward the same to the secretary of state, with his certificate attached thereto, as above provided. The forms herein given are not mandatory, and if substantially followed in any petition, it shall be sufficient, disregarding clerical and merely technical errors.

History: En. Sec. 3, Ch. 62, L. 1907; Sec. 108, Rev. C. 1907; re-en. Sec. 101, R. C. M. 1921.

Challenging Qualifications of Signers

Section 37-103 does not purport to make the county clerk's certificate conclusive and the qualifications of persons signing the petition may be inquired into by the courts if the question is presented before the election. *Martin v. State Highway Commission et al.*, 107 M 603, 614, 88 P 2d 41.

When the charge is made that the secretary of state counted signatures not properly certified, and that if the signatures so disputed were not counted there would not have been the required number for the petition to be certified, such charge must be made before the election and becomes immaterial after the general election. *State ex rel. Graham v. Board of Examiners*, 125 M 419, 239 P 2d 283, 288.

Comparison of Signatures by Clerk

The provision of this section requiring county clerks to compare the signatures on a petition for referendum with their signatures on the registration books and

blanks for the preceding general election and certify them to the secretary of state as legal voters, is invalid as excluding all persons who had become legal voters in the interim between the last general election and the time of signing such petition. *State ex rel. Gleason v. Stewart*, 57 M 397, 188 P 904.

Listing of Names of Signers in the Certification to the Secretary of State

It is sufficient compliance with this section when the county clerk lists the number of genuine signatures and also those not acceptable in the body of the certification, if he also states that the genuine signatures are marked with a certain identifying symbol and the rejected signatures with a different identifying symbol. The only purpose of listing the names is so that anyone wishing to challenge the sufficiency of the petition can identify the names. This can be done in the petition in question by an examination of the identifying symbols. *State ex rel. Graham v. Board of Examiners*, 125 M 419, 239 P 2d 283, 287.

Manner of Withdrawal of Signatures

Certification of petitions for the with-

drawal of signatures appearing on petitions for initiation of a measure, in the form prescribed by this section for certification of original petitions, is *prima facie* sufficient to show qualification and genuineness of signatures. *Ford v. Mitchell*, 103 M 99, 114, 61 P 2d 815.

Petitions Once Lodged with Clerk, Not Returnable

After referendum petitions have been lodged with the county clerk they may not be returned by him to the persons delivering them, he being required under this section to forward them, with certificate attached, to secretary of state. *State ex rel. Holloran v. McGrath*, 104 M 490, 496, 67 P 2d 838.

Referendum Petitions Open to Inspection by Public

Irrespective of whether or not referendum petitions constitute public records and as such are open to inspection, they

are "other matters" within the meaning of section 59-512, declaring that "public records and other matters in the office of any officer" are open to the inspection of any person during office hours, and mandamus lies to compel such clerk to permit inspection. *State ex rel. Holloran v. McGrath*, 104 M 490, 498, 67 P 2d 838.

Collateral References

Statutes—312, 352.

82 C.J.S. Statutes § 124.

28 Am. Jur. 164, Initiative, Referendum, and Recall, §§ 22, 23.

Withdrawal of names from petition for initiative, referendum, or recall petition. 85 ALR 1373.

Time within which officer must perform duty to pass on sufficiency of petition for initiative or referendum. 102 ALR 51.

Right of signer of petition or remonstrance to withdraw therefrom or revoke withdrawal, and time therefor. 27 ALR 2d 604.

37-104. (102) Notice to governor and proclamation. Immediately upon the filing of any such petition for the referendum or the initiative with the secretary of state, signed by the number of voters and filed within the time required by the constitution, he shall notify the governor in writing of the filing of such petition, and the governor shall forthwith issue his proclamation, announcing that such petition has been filed, with a brief statement of its tenor and effect. Said proclamation shall be published four times for four consecutive weeks in one daily or weekly paper in each county of the state of Montana.

History: En. Sec. 4, Ch. 62, L. 1907; re-en. Sec. 109, Rev. C. 1907; re-en. Sec. 102, R. C. M. 1921.

"Immediately"

The expression "immediately upon the filing" means not at once, but within sufficient time reasonably and accurately to perform the duties. *Ford v. Mitchell*, 103 M 99, 116, 61 P 2d 815.

Reference of Measures by Legislature

Failure to have the governor's proclamation that Ch. 168, Laws 1939 (omitted) would be submitted to the electors at the general election of 1940 published in newspapers as required by this section and section 23-105 did not invalidate the act, these sections applying only to measures put before the people by their own petition, and not by the legislature, and notice was amply given by distribution of copies of the law. *Nordquist v. Ford*, 112 M 278, 283, 114 P 2d 1071.

Withdrawal of Signatures

Any person signing the petition has absolute right to withdraw his name at any time before the person or body created by law to determine the matter

submitted by the petition has finally acted, and when for the initiation of a measure such time expires when the secretary of state finally determines the petition sufficient. *Ford v. Mitchell*, 103 M 99, 114, 61 P 2d 815.

The right of signers to withdraw signatures from a petition exists until the secretary of state has finally determined that the petition is sufficient, in the absence of legislative expression to the contrary. *State ex rel. O'Connell v. Mitchell*, 111 M 94, 95, 106 P 2d 180.

References

Cited as section 109, R. C. M. 1907, in *State ex rel. Gleason v. Stewart*, 57 M 397, 405, 188 P 904; *State ex rel. Bonner v. Dixon et al.*, 59 M 58, 71, 89, 195 P 841; referred to as 109, R. C. M. 1907; *State ex rel. Haynes v. District Court*, 105 M 604, 86 P 2d 4; *State ex rel. Graham v. Board of Examiners*, 125 M 419, 239 P 2d 283, 287.

Collateral References

Statutes—319, 359.

82 C.J.S. Statutes § 136.

28 Am. Jur. 171, Initiative, Referendum, and Recall, § 33.

37-105. (103) Certification and numbering of measures—constitutional amendments. The secretary of state, at the same time that he furnishes to the county clerk of the several counties certified copies of the names of the candidates for office, shall also furnish the said county clerks his certified copy of the titles and numbers of the various measures to be voted upon at the ensuing general or special election, and he shall use for each measure a title designated for that purpose by the legislative assembly, committee, or organization presenting and filing with him the act, or petition for the initiative or the referendum, or in the petition or act; provided, that such title shall in no case exceed one hundred words, and shall not resemble any such title previously filed for any measure to be submitted at that election which shall be descriptive of said measure, and he shall number such measures. All measures shall be numbered with consecutive numbers beginning with the number immediately following that on the last measure filed in the office of the secretary of state. The affirmative and negative of each measure shall bear the same number, and no two measures shall be numbered alike. It shall be the duty of the several county clerks to print said titles and numbers on the official ballot prescribed by section 23-1102, in the numerical order in which the measures have been certified to them by the secretary of state. Measures proposed by the initiative shall be designated and distinguished from measures proposed by the legislative assembly by the heading "proposed petition for initiative."

All constitutional amendments submitted to the qualified electors of the state shall likewise be placed upon the official ballot prescribed by said section 23-1102 and no such amendment shall hereafter be submitted on a separate ballot. Nothing herein contained shall be deemed to change the existing laws of the state regulating in other respects the manner of submitting such proposed amendments.

History: En. Sec. 5, Ch. 62, L. 1907; re-en. Sec. 110, Rev. C. 1907; amd. Sec. 1, Ch. 66, L. 1913; re-en. Sec. 103, R. C. M. 1921; amd. Sec. 1, Ch. 52, L. 1927.

Description of Proposal

The term "descriptive" as used in this section means a fair portrayal of the chief features of the proposed law in words of plain meaning, complete enough to convey an intelligible idea of its scope and import, free from any misleading tendency, so that intelligent and enlightened judgment may be exercised by the ordinary person in voting. *Sawyer Stores, Inc. v. Mitchell*, 103 M 148, 159, 62 P 2d 342.

Legal Requirements Mandatory—Injunction

The law having prescribed the necessary steps for submission of an initiative measure to the voters such steps are mandatory, and must be followed, and the title attached to the proposed initiative measure No. 39, the "chain store law," under the facts presented not being "de-

scriptive" but deceptive for various reasons, the supreme court has jurisdiction to entertain proceeding to enjoin the secretary of state from certifying the measure to the county clerks, and writ granted. *Sawyer Stores, Inc. v. Mitchell*, 103 M 148, 163, 175, 176, 62 P 2d 342.

Length of Title

Held, that though this section limits the title of an act referred to the people to 100 words, the fact that Ch. 168, Laws 1939 (omitted) contains 138 words, a point not raised until after the people had approved the act, was merely a procedural defect and as such insufficient to invalidate it, particularly so in view of Ch. 45, Laws 1941 (omitted), validating all bond issues theretofore authorized, thus including the issue for erection of buildings at the state hospital for the insane. *Nordquist v. Ford*, 112 M 278, 282, 114 P 2d 1071.

References

Cited or applied as section 110, Revised Codes 1907, as amended, in *State ex rel.*

Hay v. Alderson, 49 M 387, 388, 142 P 210; State ex rel. Bonner v. Dixon et al., 59 M 58, 71, 195 P 841; referred to as sec. 110, R. C. M. 1907.

Collateral References

Statutes 320, 360.
82 C.J.S. Statutes § 137.
28 Am. Jur. 167, Initiative, Referendum, and Recall, §§ 27 et seq.

37-106. (104) Manner of voting—ballot. The manner of voting on measures submitted to the people shall be by marking the ballot with a cross in or on the diagram opposite and to the left of the proposition for which the voter desires to vote. The form of ballot to be used on measures submitted to the people shall be submitted to and determined by the attorney general of the state of Montana. The following is a sample ballot representing negative vote:



For Initiative Measure No. 6
Relating to Duties of Sheriffs.



Against Said Measure No. 6.



For Referendum Measure No. 7
Relating to Purchase of Insane Asylum.



Against Said Measure No. 7.

History: En. Sec. 6, Ch. 62, L. 1907; Sec. 111, Rev. C. 1907; amd. Sec. 2, Ch. 66, L. 1913; re-en. Sec. 104, R. C. M. 1921; amd. Sec. 1, Ch. 18, L. 1937.

Cross-Reference

Ballots, secs. 23-1105, 23-1109.

Injunction of Improper Ballot

Requirements of this and preceding section are mandatory and must be complied with. Where proposed ballot for an initiative measure does not meet these requirements, the secretary of state may be enjoined from certifying the measure to

the county clerks. Sawyer Stores, Inc. v. Mitchell, 103 M 148, 159, 62 P 2d 342.

References

State ex rel. Bonner v. Dixon et al., 59 M 58, 71, 195 P 841; referred to as sec. 111, R. C. M. 1907; Sawyer Stores, Inc. v. Mitchell, 103 M 148, 152, 154, 159, 175, 62 P 2d 342.

Collateral References

Statutes 320, 360.
82 C.J.S. Statutes § 138.
28 Am. Jur. 172, Initiative, Referendum, and Recall, § 34.

37-107. (105) Printing and distribution of measures. The secretary of state shall furnish a copy of each of the proposed measures to be submitted to the people and make requisition on the state purchasing agent for the printing and delivery to him of all proposed constitutional amendments, initiative and referendum measures to be submitted to a vote of the people.

The state purchasing agent, shall, not later than the first Monday of the third month next before any general or special election, at which any proposed law is to be submitted to the people, cause to be printed a true copy of the title and text of each measure to be submitted, with the number and form in which the question will be printed on the official ballot. It shall be the duty of the state purchasing agent to call for bids and contract with the lowest responsible bidder for the printing of the pro-

posed law to be submitted to the people. Any measure proposed to be submitted to the people and which concerns the creation of any state levy, debt or liability, including the issuance of state bonds or debentures other than refunding bonds or debentures, shall be submitted to the eligible voters as defined by section 23-303, upon a separate official ballot and no such measure shall be submitted on a general ballot. All other measures proposed to be submitted to the people including constitutional amendments and initiative and referendum measures which do not concern the creation of any state levy, debt or liability, may be submitted on the general ballot as provided by section 23-1105.

The proposed law to be submitted shall be printed in news type, each page to be six inches wide by nine inches long, and when such proposed measure constitutes less than six pages, it shall be printed flat and forwarded to the county clerk and recorder of each of the several counties in that form.

When the proposed measure constitutes more than six pages, said measure shall be printed in pamphlet form, securely stapled, without cover. No proposed measure, hereafter, to be submitted to the people of the state, as provided for in this section shall be bound. The quality of the paper to be used for the proposed measure shall be left to the discretion of the state purchasing agent. The number of said proposed measures to be printed shall be five per cent (5%) more than the number of registered voters, as shown by the registration lists of the several counties of the state at the last preceding general election.

The secretary of state shall distribute to each county clerk before the second Monday in the third month next preceeding such regular general election, a sufficient number of said pamphlets to furnish one copy to every voter in his county. And each county clerk shall be required to mail to each registered voter in each of the several counties in the state at least one copy of the same within thirty (30) days from the date of his receipt of the same from the secretary of state. The mailing of said pamphlets to electors shall be a part of the official duty of the county clerk of each of the several counties, and his official compensation shall be full compensation for this additional service.

History: En. Sec. 7, Ch. 62, L. 1907; Sec. 112, Rev. C. 1907; re-en. Sec. 105, R. C. M. 1921; amd. Sec. 1, Ch. 137, L. 1927; amd. Sec. 2, Ch. 104, L. 1945; amd. Sec. 1, Ch. 67, L. 1947.

Objection Must Be Raised before Election

The objection that a measure creates a state debt, levy or liability, and that therefore it should have been placed upon a separate ballot as required by this section and section 23-303, is waived if not

raised before the election. State ex rel. Graham v. Board of Examiners, 125 M 419, 239 P 2d 283, 290.

References

State ex rel. Bonner v. Dixon et al., 59 M 58, 74, 88, 195 P 841; Nordquist v. Ford, 112 M 278, 284, 114 P 2d 1071.

Collateral References

Statutes \Rightarrow 319, 359.
82 C.J.S. Statutes § 137.

37-108. (106) Canvass of votes. The votes on measures and questions shall be counted, canvassed, and returned by the regular boards of judges, clerks, and officers as votes for candidates are counted, canvassed, and returned, and the abstract made by the several county clerks of votes on measures shall be returned to the secretary of state on separate abstract

sheets in the manner provided by sections 23-1812 and 23-1813 for abstracts of votes for state officers. It shall be the duty of the state board of canvassers to proceed within thirty days after the election, and sooner if the returns be all received, to canvass the votes given for each measure, and the governor shall forthwith issue his proclamation, which shall be published in two daily newspapers printed at the capital, giving the whole number of votes cast in the state for and against each measure and question, and declaring such measures as are approved by a majority of those voting thereon to be in full force and effect as the law of the state of Montana from the date of said proclamation, designating such measures by their titles.

History: En. Sec. 8, Ch. 62, L. 1907; Sec. 113, Rev. C. 1907; re-en. Sec. 106, R. C. M. 1921.

Collateral References

Statutes 309, 349.
82 C.J.S. Statutes § 143.

References

State ex rel. Bonner v. Dixon et al.,
59 M 58, 74 et seq., 195 P 841.

37-109. (107) Who may petition—false signature—penalties. Every person who is a qualified elector of the state of Montana may sign a petition for the referendum or for the initiative. Any person signing any name other than his own to such petition, or signing the same more than once for the same measure at one election, or who is not, at the time of signing the same, a legal voter of this state, or any officer or any person willfully violating any provision of this statute, shall, upon conviction thereof, be punished by a fine not exceeding five hundred dollars, or by imprisonment in the penitentiary not exceeding two years, or by both such fine and imprisonment, in the discretion of the court before which such conviction shall be had.

History: En. Sec. 9, Ch. 62, L. 1907; Sec. 114, Rev. C. 1907; re-en. Sec. 107, R. C. M. 1921.

Collateral References

Statutes 311, 351.
81 C.J.S. Statutes § 123.

37-110. (108) Referred bills not effective until approved. A bill passed by the legislative assembly and referred to popular vote at the next general election, or at a special election, shall not be in effect until it is approved at such general or special election by a majority of those voting for and against it.

History: En. Sec. 10, Ch. 62, L. 1907; Sec. 115, Rev. C. 1907; re-en. Sec. 108, R. C. M. 1921.

Codes, in State ex rel. Eagye v. Bawden,
51 M 357, 362, 152 P 761.

Collateral References

Statutes 365.
82 C.J.S. Statutes § 146.

References

Cited or applied as section 115, Revised

TITLE 38

INSANE AND FEEBLE-MINDED

- Chapter 1. The Montana state hospital—management, 38-101 to 38-119.
2. Examination of persons mentally deranged—commitment, 38-201 to 38-214.
 3. Transfer of state hospital patients to state training school at Boulder, 38-301 to 38-304.
 4. Examination and commitment of person as mentally deranged but not dangerous—voluntary application for admission, 38-401 to 38-412.
 5. Convalescent leave of patients, 38-501 to 38-507.
 6. Eugenical sterilization law, 38-601 to 38-608.
 7. State hospital for inebriates, 38-701 to 38-711.
 8. Montana state training school and hospital, 38-801 to 38-819.
 9. Leases of farm land for state hospital and state penitentiary authorized, 38-901, 38-902.
 10. State department of mental hygiene, 38-1001 to 38-1003.
 11. Home for senile men and women, 38-1101 to 38-1112.
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CHAPTER 1

THE MONTANA STATE HOSPITAL—MANAGEMENT

- Section 38-101. Name of Warm Springs institution changed to Montana state hospital.
- 38-102. Management—board of commissioners for insane.
- 38-103. Powers and duties of board.
- 38-104. Superintendent of state hospital and assistant—appointment, removal and salary.
- 38-105. Control in superintendent—additional medical assistants.
- 38-106. Oath of office and bonds.
- 38-107. Board may send patient to friends.
- 38-108. May contract with some other institution.
- 38-109. Discharge of patients.
- 38-110. Maintenance of indigent persons on discharge.
- 38-111. Periodic medical examination.
- 38-112. Postal rights of insane patients.
- 38-113. Same.
- 38-114. Post-office box must be provided.
- 38-115. Name of correspondent must be posted.
- 38-116. Copy of law posted in asylum.
- 38-117. Insane convicts.
- 38-118. Nonresident insane must not be received.
- 38-119. Insane person not indigent must be paid for.

38-101. Name of Warm Springs institution changed to Montana state hospital. The institution located at Warm Springs, in Deer Lodge county, state of Montana, heretofore referred to and usually known and designated as the “state insane asylum” shall hereafter be known and designated as the “Montana state hospital,” and wherever the terms “state insane asylum” or “insane asylum” may appear or be used in any section of the Revised Codes of Montana, or in any act amendatory thereof, or supplemental thereto, they shall be deemed and construed to refer to and mean the “Montana state hospital”; provided, that such change in name shall not be construed so as to, in any manner whatever, impair or work a forfeiture of any property, rights or grants made to such institution, or to the state of Montana, for its use or benefit.

History: En. Sec. 1, Ch. 76, L. 1943.

38-102. (1413) Management—board of commissioners for insane. The management, control, and supervision of the Montana state hospital located at Warm Springs, county of Deer Lodge, state of Montana, is hereby vested in the state board of commissioners for the insane, which consists of the governor, the secretary of state, and the attorney general, of which the governor is president and the secretary of state the secretary.

History: Ap. p. Secs. 2260, 2261, Pol. C. 1895; re-en. Secs. 1111, 1112, Rev. C. 1907; amd. Sec. 1, Ch. 57, L. 1913; re-en. Sec. 1413, R. C. M. 1921. Cal. Pol. C. Secs. 2136-2199.

Collateral References

Hospitals ⇐ 6.
41 C.J.S. Hospitals § 5.
26 Am. Jur. 587, Hospitals and Asylums, generally.

References

State ex rel. Dunn v. Ayers, 112 M 120, 124, 113 P 2d 785.

38-103. (1414) Powers and duties of board. The powers and duties of such board are as follows:

1. To make rules and regulations for its own government not inconsistent with the laws of the state.

2. To prescribe the duties of the superintendent of the Montana state hospital.

3. To provide for the care, custody, maintenance, and treatment of the insane in a safe and suitable building or buildings for that purpose, to be known as the Montana state hospital.

4. To make inquiry into the condition of the asylum, and to see that the inmates are properly cared for in respect to clothing, food, and medical attendance, and that they have proper apartments.

5. To make a report biennially to the legislative assembly, giving a statement of the receipts and expenditures, the conditions of the asylum, the number of inmates under treatment, and such other matters as may be advisable.

6. To keep a record of their proceedings, which must be open at all times to the inspection of any citizen.

History: Ap. p. Sec. 2262, Pol. C. 1895; 2, Ch. 57, L. 1913; re-en. Sec. 1414, R. C. re-en. Sec. 1113, Rev. C. 1907; amd. Sec. M. 1921.

38-104. (1415) Superintendent of state hospital and assistant—appointment, removal and salary. A superintendent of the state hospital who shall be a competent and qualified physician having had special and advanced training and experience in the treatment and care of mental disorders and diseases and an assistant superintendent, shall be appointed by the governor and such appointments must be transmitted to and approved by the senate. The tenure of office of the appointees shall be for a period of four (4) years from the date of the appointment and until their successors have been appointed and qualified. The annual salary of the superintendent and assistant shall be fixed by the state board of examiners, payable in monthly installments of one-twelfth (1/12) each at the end of each and every month.

The superintendent and the assistant superintendent in addition to the salaries above provided for shall be entitled to draw from the hospital commissary food supplies for their respective families, not to exceed, however,

in value the sum of fifteen hundred dollars (\$1,500.00) per year for each family. Such food supplies so drawn shall be accounted for to the board of commissioners for the hospital, in the same manner as other supplies used at the state hospital.

They shall be subject to removal by the state board of commissioners for the insane at any time for misfeasance, nonfeasance, or malfeasance in office, but before the superintendent or the assistant superintendent be so removed, formal charges in writing must be preferred, and the superintendent or the assistant charged shall be given opportunity to appear and defend himself against any such charges. When charges shall have been preferred asking the removal of the superintendent or the assistant superintendent notice of the time and place of hearing of said charges shall be served upon the accused at least five (5) days prior to the day set for the hearing; provided, however, that when such charges have been preferred, the state board of commissioners for the insane shall have the power and authority to suspend the accused until after the determination of the charges preferred against him.

History: En. Sec. 3, Ch. 57, L. 1913; re-en. Sec. 1415, R. C. M. 1921; amd. Sec. 1, Ch. 42, L. 1923; amd. Sec. 1, Ch. 149, L. 1929; amd. Sec. 1, Ch. 268, L. 1947.

Assistant Superintendent as Officer

The provisions of this section requiring that before the assistant superintendent be removed formal charges in writing must be preferred and he be given an opportunity to be heard, were not repealed by sections

273 and 275, R. C. M. 1935 (since repealed), since he is a public officer whose office is created by the legislature and not an "assistant" with employee status as used in the latter sections. State ex rel. Dunn v. Ayers, 112 M 120, 123, 113 P 2d 785.

Collateral References

Hospitals ⇨ 4.
41 C.J.S. Hospitals § 9.

38-105. (1416) Control in superintendent—additional medical assistants. The superintendent shall have immediate control and charge of the Montana state hospital and the inmates thereof, subject, however, to the orders, rules, and regulations made and prescribed by the state board of commissioners for the insane, and not inconsistent with this act; and said superintendent shall appoint additional medical assistants, whose appointment shall be subject to the approval of the state board of commissioners for the insane, and whose salaries shall be fixed by said board.

History: En. Sec. 4, Ch. 57, L. 1913; re-en. Sec. 1416, R. C. M. 1921.

38-106. (1417) Oath of office and bonds. The superintendent and assistant superintendent, before entering upon the discharge of the duties of their respective positions, shall take the constitutional oath of office and file bonds in such sums as shall be fixed by the state board of commissioners for the insane, to be approved by the said board.

History: En. Sec. 5, Ch. 57, L. 1913; re-en. Sec. 1417, R. C. M. 1921.

References

State ex rel. Dunn v. Ayers, 112 M 120, 123, 113 P 2d 785.

Collateral References

Hospitals ⇨ 4.
41 C.J.S. Hospitals § 9.

38-107. (1418) Board may send patient to friends. The board may, at the expense of the state, when satisfied it will be for the best interest of any insane person, send him to friends outside of the state.

History: En. Sec. 2280, Pol. C. 1895;
re-en. Sec. 1121, Rev. C. 1907; re-en. Sec.
1418, R. C. M. 1921.

Collateral References
Hospitals ⇨ 5.
41 C.J.S. Hospitals § 7.

38-108. (1419) May contract with some other institution. The board may, when satisfied it will be for the best interest of any insane person in the state, send him to some other institution, with its consent, outside the state, and the expense of sending and supporting him at such institution must be paid by the state, providing such person is indigent.

History: En. Sec. 2281, Pol. C. 1895;
re-en. Sec. 1122, Rev. C. 1907; re-en. Sec.
1419, R. C. M. 1921.

38-109. (1421) Discharge of patients. The board must cause to be discharged from the Montana state hospital for the insane any patient upon the written report of the hospital medical staff, that such patient is in satisfactory mental condition to be discharged. Such written report must be filed and kept in the office of the board, and every inmate on recovery must be ordered released, without requiring a sponsor.

History: En. Sec. 2283, Pol. C. 1895;
re-en. Sec. 1124, Rev. C. 1907; re-en. Sec.
1421, R. C. M. 1921; amd. Sec. 1, Ch. 165,
L. 1943. Cal. Pol. C. Sec. 2189.

Collateral References
Insane Persons ⇨ 51.
44 C.J.S. Insane Persons § 72.
28 Am. Jur. 679, Insane and Other In-
competent Persons, §§ 36 et seq.

38-110. Maintenance of indigent persons on discharge. Upon discharge of any patient of the Montana state hospital in addition to the financial aid required by section 1422, the board shall notify the board of public welfare of the county from which such patient was committed, and the said county board of public welfare shall at once ascertain whether the discharged patient is in financial need, and if such patient is found to be in financial need the county board of public welfare shall properly care for and maintain the discharged patient under the provision of the public welfare act until such patient is able to care for himself or other provision has been made for such care.

History: En. Sec. 2, Ch. 165, L. 1943.

NOTE.—Section 1422, referred to above,
was repealed by Sec. 8, Ch. 145, Laws
1941.

38-111. Periodic medical examination. It shall be the duty of the hospital medical staff to examine patients who have curable diseases every six months.

History: En. Sec. 3, Ch. 165, L. 1943;
amd. Sec. 1, Ch. 153, L. 1957.

38-112. (1423) Postal rights of insane patients. The patients of all insane asylums, or any place where the insane are kept or confined in this state, must each be allowed to choose one person, in no way connected with such asylums or place, to whom he may write whenever and whatever he may desire, and over the letters to such person there must be no censorship exercised or allowed by any asylum official, contractor, employee, or other person. The postal rights of such patients as to the persons chosen by them must be as free and unrestricted as are those of any resident of

the state. Every patient has the right, once in three months, to choose a different person for his correspondent.

History: En. Sec. 2285, Pol. C. 1895;
re-en. Sec. 1126, Rev. C. 1907; re-en. Sec.
1423, R. C. M. 1921.

38-113. (1424) Same. The contractor or person in charge of every asylum or other place where the insane are confined in this state must furnish to every patient thereof, suitable material for writing, enclosing, sealing, stamping, and mailing letters at least twice a week.

History: En. Sec. 2286, Pol. C. 1895;
re-en. Sec. 1127, Rev. C. 1907; re-en. Sec.
1424, R. C. M. 1921.

Collateral References
Hospitals↔6.
41 C.J.S. Hospitals § 6.

38-114. (1425) Post-office box must be provided. All such letters must be dropped by the writers thereof, accompanied by an attendant when necessary, into a post-office box provided by the state at the insane asylum, and kept in some place easy of access to all patients; the attendant is required in all cases to see that these letters are directed to the patient's correspondent, and if they are not so directed they must be held subject to the disposal of the person in charge, and the contents of these boxes must be collected once every week by an authorized person, and by him placed in the United States mail for delivery.

History: En. Sec. 2287, Pol. C. 1895;
re-en. Sec. 1128, Rev. C. 1907; re-en. Sec.
1425, R. C. M. 1921.

38-115. (1426) Name of correspondent must be posted. The contractor, or person in charge, must register and post in some place in the asylum the name of the person chosen as the patient's correspondent, and by what patient chosen, and the contractor or the person in charge must inform each of the persons chosen of that fact, and request him to write on the outside of the envelope of every letter he writes the patient, his name, and all the letters bearing such superscription on the envelope must be delivered without opening or reading to the patient.

History: En. Sec. 2288, Pol. C. 1895;
re-en. Sec. 1129, Rev. C. 1907; re-en. Sec.
1426, R. C. M. 1921.

38-116. (1427) Copy of law posted in asylum. A printed copy, in large type, of the next preceding four sections must be kept posted in every room of every asylum or other place where the insane are confined in this state.

History: En. Sec. 2289, Pol. C. 1895;
re-en. Sec. 1130, Rev. C. 1907; re-en. Sec.
1427, R. C. M. 1921.

38-117. (1428) Insane convicts. Insane convicts must be received into the asylum and returned to the state prison again, as provided in Title 94.

History: En. Sec. 2290, Pol. C. 1895;
re-en. Sec. 1131, Rev. C. 1907; re-en. Sec.
1428, R. C. M. 1921.

Collateral References
Insane Persons↔86.
44 C.J.S. Insane Persons § 130.

4 Am. Jur. 73, Arrest, §§ 116 et seq.;
14 Am. Jur. 788, Criminal Law, §§ 32 et
seq.

Test of present insanity preventing trial
or punishment. 3 ALR 94.

Constitutionality of statute which pro-
vides for commitment of accused acquit-

ted on ground of insanity to hospital for
insane without examination of present
mental condition. 145 ALR 892.

Test or criterion of mental condition
within contemplation of statute providing
for commitment of persons because of
mental condition. 158 ALR 1220.

38-118. (1429) Nonresident insane must not be received. No insane
person, nonresident of this state, must be received into the asylum unless he
became insane within this state.

History: En. Sec. 2291, Pol. C. 1895;
re-en. Sec. 1132, Rev. C. 1907; re-en. Sec.
1429, R. C. M. 1921.

38-119. (1430) Insane person not indigent must be paid for. None but
indigent persons must be received into the Montana state hospital unless
their care and maintenance is paid or guaranteed by the parents, children,
or guardians of such person, and all money received by the contractor for
the care and maintenance of such persons must be accounted for in his
settlement with the board.

History: En. Sec. 2292, Pol. C. 1895;
re-en. Sec. 1133, Rev. C. 1907; re-en. Sec.
1430, R. C. M. 1921.

Constitutionality of statute imposing
liability upon estate or relatives of insane
person for his support in asylum. 48 ALR
733.

Collateral References

Insane Persons—52.

44 C.J.S. Insane Persons §§ 74, 76.

Liability of husband for support and
care of insane wife. 4 ALR 1109.

Labor or services performed by one
while inmate of a government institution
as basis of deduction or setoff in respect
of the liability of his estate or his rela-
tives. 114 ALR 981.

CHAPTER 2

EXAMINATION OF PERSONS MENTALLY DERANGED—COMMITMENT

Section 38-201. Examination before magistrate—affidavit and warrant for apprehen-
sion.

38-202. Subpoenas for witnesses.

38-203. Subpoenas for physicians.

38-204. Witnesses, duty of.

38-205. Physicians, duty of.

38-206. Certificate of physicians.

38-207. Forms of certificates.

38-208. Commitment.

38-208.1. Admission of patients prior to legal commitment—when authorized.

38-208.2. Legal commitment within five days after emergency admission.

38-208.3. Cost of commitment proceedings.

38-209. Delivery of insane person at state hospital.

38-210. Moneys of insane person—disposal of.

38-211. Fees of physicians.

38-212. Cost of examination and commitment.

38-213. Dissatisfied persons—procedure on question of insanity.

38-214. Hearing and examination of insane person—maintenance—contribu-
tion by relatives—when had.

**38-201. (1431) Examination before magistrate—affidavit and warrant
for apprehension.** (1) Whenever it appears by affidavit to the satisfaction
of a magistrate of a city or county, that any person therein is so far
disordered in his mind as to endanger health, person, or property, he must

issue and deliver to some peace officer, for service, a warrant directing that such person be apprehended and taken before a judge of the district court of the county, for a hearing and examination on such charge. Such officer must thereupon apprehend and detain such person until a hearing and examination can be had, as hereinafter provided. Pending the examination and hearing, such order may be made relative to the care, custody or confinement of the alleged insane person as the judge shall see fit. At the time of the apprehension a copy of said affidavit and warrant of apprehension must be personally delivered to said person.

(2) Such affidavit and warrant shall be in substantially the following form:

IN THE.....COURT
OF.....
COUNTY OF.....STATE OF MONTANA

AFFIDAVIT OF INSANITY

In the matter of....., an alleged insane person.

State of Montana,
County of } ss.

....., being duly sworn, deposes and says that there is now in said county, in the city or town of a person named, who is insane, and is so far disordered in mind as to endanger the health, person, or the property of h.....self, or of others, and that he, at in said county, on the day of 19..., threatened and attempted (state actions, etc.)

That by reason of such insanity, said person is dangerous to be at large:
Wherefore, affiant prays that such action may be had as the law requires in the cases of persons who are so far disordered in mind as to endanger health, person and property.

Subscribed and sworn to before me this day of, 19....

WARRANT OF APPREHENSION
IN THE COURT, COUNTY OF
STATE OF MONTANA

In the matter of, an alleged insane person.

The State of Montana, to any sheriff, constable, marshal, policeman, or peace officer, in this State:

The affidavit of, having been presented this day to me, a (here state office or title of magistrate, e.g. police judge,

justice of the peace, district judge, etc.,) in the county of _____, State of Montana, from which it appears that there is now in this county, at _____ a person by the name of _____, who is insane, and who is so disordered in mind as to endanger h..... own health, person and property (or the person, lives and property of others), and that it is dangerous for said person to be at large;

And it satisfactorily appearing to me that said _____ is insane, and so far disordered in h..... mind as to endanger health, person, and property;

Now, therefore, you are commanded forthwith to apprehend the above named person, and take h..... before a judge of the district court of the _____ judicial district in and for the county of _____ for a hearing and examination on the said charge of insanity.

And I hereby direct that a copy of this warrant, together with a copy of said affidavit, be delivered to said _____ at the time of h..... apprehension; and I further direct that this warrant may be served at any hour of the day or night.

Witness my hand this _____ day of _____, 19....

RETURN SHOWING SERVICE OF WARRANT

I hereby certify that I received the above warrant of apprehension on the _____ day of _____ 19..., and served the said warrant by apprehending, in the county of _____ on the _____ day of _____, 19..., the said _____, alleged to be insane, and bringing h..... before _____, judge of the district court of said _____ county on the _____ day of _____, 19...; and I further certify that I delivered a copy of said warrant of apprehension, together with a copy of the affidavit of insanity, as directed in said warrant, personally to said _____, at the time of the apprehension.

(3) He must be taken before a judge of the district court, to whom said affidavit and warrant of apprehension must be delivered to be filed with the clerk. The judge must then inform him that he is charged with being insane, and inform him of his rights to make a defense to such charge and produce any witnesses in relation thereto. The judge must by order fix such time and place for the hearing and examination in open court as will give reasonable opportunity for the production and examination of witnesses; provided, however, that if the patient is too ill to appear in court, or if it would be detrimental to the mental or physical health of the patient, the judge may hold the necessary hearing at the bedside of the patient. Said order must be entered at length in the minute book of the court or must be signed by the judge and filed and a certified copy of the same served on such person. The judge must also order that notice of apprehension of such person and the hearing

on such charge of insanity be served on such relatives of said person known to be residing in the county as the court may deem necessary or proper.

History: Ap. p. Sec. 2300, Pol. C. 1895; amd. Sec. 1, p. 163, L. 1897; re-en. Sec. 1134, Rev. C. 1907; re-en. Sec. 1431, R. C. M. 1921; amd. Sec. 1, Ch. 117, L. 1939.

Cross-References

Actions by or against insane person, secs. 93-2806, 93-2704-1(c).

Application of Montana Rules of Civil Procedure to this chapter, sec. 93-2711-7.

Cruel treatment, penalty, sec. 94-3541.

Guardianship of insane persons, secs. 91-4701 to 91-4706.

Service of summons on insane person, sec. 93-2702-2D(2)(d).

Use of force in managing insane person, penalty, sec. 94-605.

Jurisdiction of Chairman of Board of County Commissioners

On application for writ of certiorari to review an insanity proceeding heard before the chairman of a board of county commissioners in the absence of the district judge of the county, under this and the following sections, since such chairman sits as a tribunal of very limited power, no presumption may be indulged that he had jurisdiction to enter an order of commitment, but his jurisdiction must be made to appear affirmatively in the record; otherwise the proceedings had are void. (Decided under statute prior to 1939 amendment.) State ex rel. Leonidas v. Larson, 109 M 70, 73, 92 P 2d 774.

38-202. (1432) Subpoenas for witnesses. When the person is taken before the judge, the judge must issue subpoenas to two or more witnesses best acquainted with said insane person, to appear before him and testify at such examination.

History: Ap. p. Sec. 2301, Pol. C. 1895; amd. Sec. 2, p. 163, L. 1897; re-en. Sec. 1135, Rev. C. 1907; re-en. Sec. 1432, R. C. M. 1921; amd. Sec. 2, Ch. 117, L. 1939. Cal. Pol. C. Sec. 2169.

Presence of Subject at Inquisition

Under this section and the sections following, must a person alleged to be of unsound mind be personally present in court at the inquisition in all cases, or must he, regardless of his mental or physical condition, be given notice of the hearing and an opportunity to defend? State ex rel. Hoatson v. District Court, 95 M 174, 177, 26 P 2d 172. (Decided under statute prior to 1939 amendment.)

Presumption of Insanity Rebuttable

By virtue of section 64-112, an adjudication of insanity under sections 38-201 to 38-208 does not establish a conclusive, but a rebuttable presumption of insanity. Section 64-112 substitutes for the presumption of sanity the presumption of insanity until the certificate provided for is obtained. State v. Bucy, 104 M 416, 419, 66 P 2d 1049.

References

State v. Kitchens, 129 M 331, 286 P 2d 1079, 1080.

Collateral References

Insane Persons \S 12, 13.
44 C.J.S. Insane Persons \S 17, 18.
28 Am. Jur. 661, Insane and Other Incompetent Persons, \S 9 et seq.

Action for false imprisonment or malicious prosecution predicated upon institution of, or conduct in connection with, lunacy proceedings. 145 ALR 711.

Alleged incompetent as witness in lunacy inquisition. 22 ALR 2d 756.

References

State ex rel. Hoatson v. District Court, 95 M 174, 178, 26 P 2d 172.

Collateral References

Insane Persons \S 19.
44 C.J.S. Insane Persons \S 19.

38-203. (1433) Subpoenas for physicians. The judge must also issue subpoenas for at least two graduates of medicine to appear and attend such examination.

History: Ap. p. Sec. 2302, Pol. C. 1895; amd. Sec. 3, p. 163, L. 1897; re-en. Sec. 1136, Rev. C. 1907; re-en. Sec. 1433, R. C. M. 1921; amd. Sec. 3, Ch. 117, L. 1939.

References

State ex rel. Hoatson v. District Court, 95 M 174, 178, 26 P 2d 172.

38-204. (1434) Witnesses, duty of. At the examination the persons subpoenaed must appear and answer all questions pertinent to the matter under investigation.

History: En. Sec. 2303, Pol. C. 1895; re-en. Sec. 1137, Rev. C. 1907; re-en. Sec. 1434, R. C. M. 1921.

Substantial Compliance with Statutory Provisions Mandatory

In a proceeding to determine the sanity of a person at least substantial compliance with the statutory provisions (this section through section 38-208) is manda-

tory, and in determining whether such a person was denied his rights, the supreme court is governed by the substance and not the mere form of things. State ex rel. Hoatson v. District Court, 95 M 174, 178, 26 P 2d 172.

Collateral References

Insane Persons \S 20.
44 C.J.S. Insane Persons \S 25.

38-205. (1435) Physicians, duty of. The physicians must hear such testimony, and must make a personal examination of the alleged insane person.

History: En. Sec. 2304, Pol. C. 1895; re-en. Sec. 1138, Rev. C. 1907; re-en. Sec. 1435, R. C. M. 1921.

Substantial Compliance with Statutory Provisions Mandatory

In a proceeding to determine the sanity of a person at least substantial compliance with the statutory provisions (secs. 38-204 to 38-208) is mandatory, and in

determining whether such a person was denied his rights, the supreme court is governed by the substance and not the mere form of things. State ex rel. Hoatson v. District Court, 95 M 174, 178, 26 P 2d 172.

Collateral References

Insane Persons \S 21.
44 C.J.S. Insane Persons \S 24.

38-206. (1436) Certificate of physicians. The physicians, after hearing the testimony and making the examination, must, if they believe such person to be dangerously insane, make a certificate, under their hand, showing as near as possible:

1. That such person is so far disordered in his mind as to endanger health, person, or property.
2. The premonitory symptoms, apparent cause or class of insanity, the duration and condition of the disease.
3. The nativity, age, residence, occupation, and previous habits of the person.
4. The place from whence the person came, and the length of time he has resided in this state.

History: En. Sec. 2305, Pol. C. 1895; re-en. Sec. 1139, Rev. C. 1907; re-en. Sec. 1436, R. C. M. 1921. Cal. Pol. C. Sec. 2170.

Number of Physicians Required

The statutory requirement that two physicians shall hear the evidence introduced at an insanity hearing, examine the person said to be of unsound mind and make the certificate called for by this section, is jurisdictional; hence where by reason of the disqualification of one of such physicians, an order declaring the person under investigation insane was based upon the certificate of but one physician, it was void for lack of jurisdiction. State ex rel. Hoatson v. District Court, 95 M 174, 178, 26 P 2d 172.

Substantial Compliance with Statutory Provisions Mandatory

In a proceeding to determine the sanity of a person at least substantial compliance with the statutory provisions (secs. 38-204 to 38-208) is mandatory, and in determining whether such a person was denied his rights, the supreme court is governed by the substance and not the mere form of things. State ex rel. Hoatson v. District Court, 95 M 174, 178, 26 P 2d 172.

References

State v. Bucy, 104 M 416, 418, 66 P 2d 1049.

38-207. (1437) Forms of certificates. The certificate must be made in the form prescribed by, and if they can be had, upon blanks furnished by the board of the commissioners for the insane.

History: En. Sec. 2306, Pol. C. 1895; re-en. Sec. 1140, Rev. C. 1907; re-en. Sec. 1437, R. C. M. 1921.

Substantial Compliance with Statutory Provisions Mandatory

In a proceeding to determine the sanity of a person at least substantial compli-

ance with the statutory provisions (secs. 38-204 to 38-208) is mandatory, and in determining whether such a person was denied his rights, the supreme court is governed by the substance and not the mere form of things. State ex rel. Hoatson v. District Court, 95 M 174, 178, 26 P 2d 172.

38-208. (1438) Commitment. The judge, after such examination and certificate made, if he believes the person so far disordered in his mind as to endanger health, person, or property, must make an order that the party be confined in the Montana state hospital, and a copy of such order must be filed with and recorded by the clerk of the district court of the county. The clerk must also keep in convenient form an index book, showing the name, age, and sex of each person so ordered to be confined in the Montana state hospital, with the date of the order and the name of the insane asylum in which the person is ordered to be confined. No fees must be charged by the clerk for performing any of the duties provided for by this section or in this chapter.

History: Ap. p. Sec. 2307, Pol. C. 1895; amd. Sec. 4, p. 163, L. 1897; re-en. Sec. 1141, Rev. C. 1907; re-en. Sec. 1438, R. C. M. 1921; amd. Sec. 4, Ch. 117, L. 1939. Cal. Pol. C. Sec. 2171.

NOTE.—See in connection with this section, section 82-402.

Allegations of Complaint

A complaint alleging that an insane person was "so declared by a court of competent jurisdiction," and "was duly committed to the insane asylum," does not show the duty of the keeper of the asylum to receive and keep him, since the allegation does not show the name of the court, or that any order was made or delivered to such keeper. Walter v. Mitchell, 25 M 385, 388, 65 P 5.

Substantial Compliance with Statutory Provisions Mandatory

In a proceeding to determine the sanity

of a person at least substantial compliance with the statutory provisions (secs. 38-204 to 38-208) is mandatory, and in determining whether such a person was denied his rights, the supreme court is governed by the substance and not the mere form of things. State ex rel. Hoatson v. District Court, 95 M 174, 178, 26 P 2d 172.

References

Cited or applied as section 2307, Political Code, before amendment, in Walter v. Mitchell, 25 M 385, 388, 65 P 5; State v. Bucy, 104 M 416, 418, 66 P 2d 1049.

Collateral References

Insane Persons ⇨ 49.
44 C.J.S. Insane Persons § 65.
28 Am. Jur. 672, Insane and Other Incompetent Persons, §§ 26 et seq.

38-208.1. Admission of patients prior to legal commitment—when authorized. That the superintendent, or acting superintendent, of the Montana state hospital shall have the right and authority to accept and admit patients to the Montana state hospital who have not been legally committed to the hospital, when a patient is presented for admission accompanied by a certificate from the county physician in the county in which the patient resides, stating that to the best of his knowledge and belief this patient is suffering from acute mania or circular insanity and requires immediate hospitalization and who, by reason of the absence of the district

judge from the county of the patients' residences, have not been legally committed to the Montana state hospital.

History: En. Sec. 1, Ch. 182, L. 1953.

Collateral References

Insane Persons ~~49~~.

44 C.J.S. Insane Persons § 64.

38-208.2. Legal commitment within five days after emergency admission.

Within five (5) days after the admission to the state hospital of patients who have not been legally committed as hereinbefore provided, the superintendent or acting superintendent of said hospital shall have such patients legally committed thereto by the district court of the third judicial district of the state of Montana in and for the county of Deer Lodge or shall release and discharge such patients from said hospital, if, by reason of the absence of the district judge of the third judicial district of the state of Montana, in and for the county of Deer Lodge, or, if a jury trial is being held by such district judge, and prevents the handling of said matter as aforementioned, the patient shall be legally committed as soon after the return of the district judge as possible, or as soon as the district judge is available to attend to such admission.

History: En. Sec. 2, Ch. 182, L. 1953;
amd. Sec. 1, Ch. 92, L. 1957.

38-208.3. Cost of commitment proceedings. In all cases provided for by this act the costs of commitment proceedings shall be paid by the county of the patients' residences, and, after the order of commitment has been signed by the district judge of the third judicial district of the state of Montana, in and for the county of Deer Lodge, said order and all other papers relative to the commitment of said person shall be forwarded by the clerk of the district court in and for the county of Deer Lodge, to the clerk of the district court of the county of the patients' residences, or of the county from which the patient has been sent to the state hospital, and shall be placed on record and filed in that office, and shall not be placed on record and filed in the office of the clerk of the district court of Deer Lodge county, unless the patient is a resident of, or has been sent from Deer Lodge county.

History: En. Sec. 3, Ch. 182, L. 1953;
amd. Sec. 1, Ch. 77, L. 1955; amd. Sec. 1,
Ch. 127, L. 1957.

38-209. (1439) Delivery of insane person at state hospital. The insane person, together with the order of the judge, and the certificate of the physicians must be delivered to the sheriff of the county in which said order is made, or to a responsible relative or friend, as determined by the judge who signs said order, and by him must be delivered to the officer in charge of the Montana state hospital. The superintendent or person in charge of the state hospital for the insane may refuse to receive any person upon any order, if the papers presented do not comply with the provisions of this chapter.

History: Ap. p. Sec. 2308, Pol. C. 1895; 1142, Rev. C. 1907; re-en. Sec. 1439, R. C.
amd. Sec. 5, p. 164, L. 1897; re-en. Sec. M. 1921; amd. Sec. 5, Ch. 117, L. 1939;

amd. Sec. 1, Ch. 181, L. 1957. Cal. Pol. C. Sec. 2172.

Collateral References

Insane Persons ⇨ 49.

44 C.J.S. Insane Persons § 69.

38-210. (1440) Moneys of insane person—disposal of. When any person is adjudged to be insane and ordered committed to the Montana state hospital, or is adjudged to be in such a condition of mind that he should be placed in such hospital for observation, all moneys found on him at the time he is taken into custody must be certified to by the judge, and sent with such person to the hospital, to be delivered to the superintendent thereof, whose receipt therefor shall be taken by the officer or other person delivering him to the hospital, who must file such receipt with the clerk of the district court of the county in which the proceedings were had. If the amount exceeds one hundred dollars (\$100.00), the excess must be applied to the payment of the expenses of such person while in the hospital. If the amount is one hundred dollars (\$100.00) or less it must be kept and delivered to the person when discharged or released from the hospital or applied in payment of funeral expenses if such person dies while in such hospital. If any amount standing to the credit of any person paroled, discharged or released, or after payment of the funeral expenses of such person who dies while in such hospital, shall remain unclaimed for one (1) year after such parole, discharge, release or death, fifty per centum (50%) of such amount, but not in any event exceeding fifty dollars (\$50.00) shall be withdrawn from such account and placed in the "patients' deposit account, special account," to be expended for indigent patients at such times and in such manner and for such purposes as may be prescribed by the superintendent of such hospital. Any balance remaining to the credit of any such person, shall be transmitted to the county treasurer of the county from which said person was sent, and if any sum remains after paying the costs of hearing, and transportation to the hospital, the balance shall be paid into the state treasury to the credit of the general fund.

History: Ap. p. Sec. 2309, Pol. C. 1895; M. 1921; amd. Sec. 6, Ch. 117, L. 1939; amd. Sec. 6, p. 164, L. 1897; re-en. Sec. 1143, Rev. C. 1907; re-en. Sec. 1440, R. C. amd. Sec. 2, Ch. 76, L. 1943.

38-211. (1441) Fees of physicians. The physicians attending each examination of an insane person are allowed each such fee as may be fixed and determined by the court and in addition their actual traveling expenses, not to exceed the sum of ten cents (10¢) for each and every mile actually and necessarily traveled by said physician in attending said examination, and in returning to his home therefrom, to be paid by the county treasurer of the county, where the examination was had, on the order of the judge.

The clerk of the district court must give to such physician a certificate, under seal, of travel and attendance, which shall entitle him to receive the amount therein stated from the county treasurer.

History: Ap. p. Sec. 2310, Pol. C. 1895; re-en. Sec. 1144, Rev. C. 1907; amd. Sec. 1, Ch. 84, L. 1911; re-en. Sec. 1441, R. C. M. 1921; amd. Sec. 7, Ch. 117, L. 1939; amd. Sec. 1, Ch. 134, L. 1957.

Collateral References

Insane Persons ⇨ 21.

44 C.J.S. Insane Persons § 24.

38-212. (1442) Cost of examination and commitment. The cost of the examination, committal, and taking an insane person to the asylum must be paid by the county in which he resides at the time he is adjudged insane. The sheriff must be allowed the actual expenses incurred in taking an insane person to the asylum, as provided by section 16-2723 of this code.

History: En. Sec. 2311, Pol. C. 1895; re-en. Sec. 1145, Rev. C. 1907; re-en. Sec. 1442, R. C. M. 1921. Cal. Pol. C. Sec. 2175.

NOTE.—This section changed to harmonize with section 3137, Revised Codes 1907 (16-2723).

References

Cited or applied as section 2311, Political Code, in *Proctor v. Cascade County*, 20 M 315, 317, 50 P 1017.

Collateral References

Insane Persons \Rightarrow 28.
44 C.J.S. Insane Persons § 34.

38-213. (1443) Dissatisfied persons—procedure on question of insanity.

(1) If a person ordered to be committed, or any friend in his behalf, is dissatisfied with the order of the judge committing him, he may, within five days after the making of such order, demand that the question of his sanity be tried by a jury before the district court of the county in which he was committed. Thereupon that court must cause a jury to be summoned and to be in attendance at a date stated, not less than five nor more than ten days from the date of the demand for a jury trial.

(2) At such trial the cause against the alleged insane must be represented by the county attorney of the county, and the trial must be had as provided by law for the trial of civil causes before a jury, and the alleged insane person must be discharged unless a verdict that he is insane is found by at least three-fourths of the jury.

(3) If the verdict of the jury is that he is insane, the judge must adjudge that fact and make an order of commitment as upon the original hearing. Such order must be presented, at the time of commitment of such insane person, to the superintendent or person in charge of the hospital to which the insane person is committed, and a copy thereof be forwarded by such superintendent to the board of the commissioners for the insane and filed in its office.

(4) Proceedings under the order must not be stayed, pending the proceedings for determining the question of sanity by a jury, except upon the order of a district judge, with provision made therein for such temporary care and custody of the alleged insane person as may be deemed necessary. If the district judge, by the order granting the stay, commits the accused insane to the custody of any person other than a peace officer, he may, by such order, require a bond for his appearance at the trial. If a judge refuses to grant an application for an order of commitment of an insane person alleged to be dangerous to himself and others, if at large, he must state his reasons for such refusal, and any person aggrieved thereby may demand a trial of the question of the insanity of such accused insane, in the manner hereinbefore provided for a jury trial when demanded by or on behalf of the accused insane.

(5) If the person sought to be committed is not a poor or indigent person, the costs of the proceedings are a charge upon his estate, or must be paid by persons legally liable for his maintenance, unless otherwise ordered by the judge. If the alleged insane person is adjudged not to

be insane, the judge may, in his discretion, charge the costs of the proceedings to the person making the application for an order of commitment, and judgment may be entered against him for the amount thereof and enforced by execution.

History: En. Sec. 7, p. 164, L. 1897; re-en. Sec. 1146, Rev. C. 1907; re-en. Sec. 1443, R. C. M. 1921; amd. Sec. 8, Ch. 117, L. 1939.

Noncompliance with Procedural Requirements

In an insanity proceeding heard before the chairman of a board of county commissioners, where service of a warrant of arrest was not affirmatively shown by a return thereof, and no transcript of the proceedings filed in the office of the clerk of the district court and entered on the minutes of the probate proceedings until long after the examination, and the matter not called to the attention of the

district judge of the first term of court thereafter for his approval, the order of commitment was a nullity. (Decided under statute prior to 1939 amendment.) State ex rel. Leonidas v. Larson, 109 M 70, 73, 92 P 2d 774.

Collateral References

Insane Persons—24, 28.

44 C.J.S. Insane Persons §§ 28, 30, 34.

28 Am. Jur. 679, Insane and Other Incompetent Persons, §§ 36 et seq.

Constitutional right to jury trial in proceeding for adjudication of incompetency or insanity or for restoration. 33 ALR 2d 1145.

38-214. (1444) Hearing and examination of insane person—maintenance—contribution by relatives—when had. (1) When the judge has fixed the time for hearing and examination, as provided in section 38-201, the clerk of court must immediately deliver to the county board of public welfare a written notice giving the name of person named in the affidavit and warrant, his place of residence, and the name of the person making the affidavit, and some member of the staff of such board must within thirty (30) days after the notice is served on the board make an investigation to ascertain and determine the financial condition of the person named in such affidavit and warrant, the property and value thereof, if any be owned by such person, the income, if any, therefrom, names of relatives, if any, legally liable for the support and maintenance of such person, and their financial condition and ability to pay the cost of such proceeding, transportation to the Montana state hospital, and care and maintenance of such person therein, and shall make a written report of such investigation and file the same with the clerk of the court and serve a copy of the report upon the superintendent of the Montana state hospital.

(2) It shall be the duty of the judge, before whom the sanity hearing is had, to take evidence as to the financial worth of said person, the property and value thereof owned by him, if any, and the income, if any therefrom, and the financial condition and ability of any and all persons legally liable for his support and maintenance to pay the costs of such proceeding, transportation to the state hospital and care and maintenance of such person therein, and when the report of the member of the staff of the county public welfare board making the aforesaid investigation has been filed in the office of the clerk of the court it shall be considered and deemed a part of such evidence. All evidence introduced shall be reduced to writing and filed in the office of the clerk of said court, together with all orders, subpoenas, affidavits, complaints, warrants and papers used on said hearing or made by said judge, and said clerk shall enter upon the journal of the minutes of probate proceedings a record of all proceedings had, in the same manner as proceedings in probate. Copies of all the

evidence relating to the financial condition of the person shall be sent to the superintendent of the Montana state hospital.

(3) If, after all of the evidence, including the welfare report has been filed as aforementioned, it appears from said evidence that such person has any means, money or property out of which the costs of the proceeding, transportation to the state hospital and his maintenance therein, or any part thereof could be paid, it shall be the duty of the judge before whom such hearing is had, to issue a citation to any person or persons in possession of such property, or any thereof, and to the relatives of such person, if any there be in the county of which such person is a resident, citing them to appear and show cause why a guardian should not be appointed for such person, and why said guardian should not be ordered to pay the costs of such proceeding, transportation to the state hospital and cost of the maintenance of such person, or so much thereof as his means will permit, which citation shall be served and all proceedings thereunder conducted as provided by sections 91-4301 to 91-4322, and if it appears to the court that such person has property that can be applied towards the payment of the costs of the proceeding, transportation to the state hospital and his maintenance therein, it shall be the duty of the court to make an order to that effect, stating how much of such person's property shall be so applied, the amount to be fixed with due regard to the proper preservation of the estate of such person, provided that the amount fixed for the maintenance of such person in such hospital shall not, in any event, exceed the sum of three dollars (\$3.00) per day for the first ninety (90) days from and after the date of the first admission, and thereafter shall not exceed the sum of two dollars (\$2.00) per day. If it appears to the court that such person has no means, money or property, or not sufficient means, money or property, to pay the costs of the proceeding, transportation to the state hospital and his maintenance therein, but has relatives who are legally liable for his maintenance and support, and upon whom citation has been served as herein provided, who are financially able to pay such costs of proceedings, transportation and maintenance, or a part thereof, it shall be the duty of the court to make an order to that effect, stating therein the names of such relatives, and requiring them to pay such costs of proceedings, transportation and maintenance, in such hospital, or so much thereof as may be fixed in such order; provided that the amount fixed for the maintenance of such person in such hospital shall not, in any event, exceed the sum of three dollars (\$3.00) per day for the first ninety (90) days from and after the date of the first admission, and thereafter shall not exceed the sum of two dollars (\$2.00) per day.

(4) If it appears to the court that such person is an indigent and has no relatives legally liable for his support and maintenance the court shall make an order so stating and that such person is to be received at such hospital as an indigent person. Provided, however, that in the event any such person so admitted as a patient under the provision of this act as an indigent person shall thereafter be found not to have been indigent, or shall come into an estate of inheritance, or acquire property of any kind, or be the recipient, or entitled to the receipt, of any income of any nature, trust

or otherwise, that in any of such event, while the person remains a patient at the state hospital, the state of Montana shall be entitled to recover the cost and care for the maintenance of said patient from any of such assets owned, earned or accruing to said patient, and provided further that after dismissal as a patient, any such recovery shall apply only against an estate of inheritance.

(5) Whenever any order is made by the court directing the payment of the costs of proceeding, transportation and maintenance or any part thereof of any person out of the estate of such person, or by any relatives thereof legally liable for his support and maintenance, such order must be filed in the office of the clerk of the court and such court must make duplicate certified copies thereof, delivering one thereof to the board of county commissioners of such county and transmitting the other thereof to the superintendent of the Montana state hospital.

History: En. Sec. 8, p. 165, L. 1897; re-en. Sec. 1147, Rev. C. 1907; re-en. Sec. 1444, R. C. M. 1921; amd. Sec. 9, Ch. 117, L. 1939; amd. Sec. 3, Ch. 76, L. 1943; amd. Sec. 1, Ch. 49, L. 1955; amd. Sec. 1, Ch. 131, L. 1959. Cal. Pol. C. Secs. 2179-2180.

Action by State to Recover Expenses of Care

An action by the state to recover the expenses of care furnished to a person committed as an indigent is based upon a mutual, open and current account; the action may include care from the time the patient entered the hospital; and the statute of limitations would not commence to run until the day the last item for care, support, and maintenance was furnished. *State v. Byrne*, — M —, 350 P 2d 380.

After-Acquired Property

The estate of a person committed to the state hospital at state expense can be held liable for the expenses of care furnished to the patient prior to the time, and also after the time, the patient acquires an estate. *State v. Byrne*, — M —, 350 P 2d 380.

Presentation of Claim to Administrator

The statute of nonclaim section 91-2704

is limited to contract obligations and does not include one imposed by statute. In action by state against administrator of estate of person confined in state hospital at private expense by court order under authority of this section, presentation of claim was not required as a prerequisite to right to bring action. *State v. Pahnish*, 116 M 340, 342, 151 P 2d 1001.

Collateral References

Insane Persons—52, 53.

44 C.J.S. Insane Persons §§ 73, 74.

28 Am. Jur. 682, Insane and Other Incompetent Persons, §§ 42 et seq.

Liability of husband for support and care of insane wife. 4 ALR 1109.

Constitutionality of statute imposing liability upon estate or relatives of insane person for his support in asylum. 48 ALR 733.

Labor or services performed by one while inmate of a government institution as basis of deduction or setoff in respect of the liability of his estate or his relatives. 114 ALR 981.

Liability of incompetent's estate for care and maintenance furnished by public institution or hospital before incompetent's acquisition of any estate or property. 33 ALR 2d 1257.

CHAPTER 3

TRANSFER OF STATE HOSPITAL PATIENTS TO STATE TRAINING SCHOOL AT BOULDER

- Section 38-301. Transfer of patients to Montana state training school at Boulder.
 38-302. Admission of certain inmates at Montana state hospital to state training school.
 38-303. Expenses of examination and transportation.
 38-304. Expenses of clothing.

38-301. (1444.1) Transfer of patients to Montana state training school at Boulder. (1) When any person has been heretofore, or may be here-

after committed to the Montana state hospital as an insane person, and the superintendent and physicians of such hospital shall determine and conclude from examination, tests and observation of such person, that he is not a proper person to be confined in such hospital but should properly be placed in the Montana state training school at Boulder, the superintendent of the state hospital shall ascertain from the superintendent, or person in charge of the state training school, whether or not there is room and accommodations for such person at such training school.

(2) If there is room and accommodations for such person at such training school, then the superintendent of the state hospital shall make a certificate in triplicate, which shall give the name of the person to be transferred, the county from which committed to such hospital, date of commitment and date received at such state hospital, and state as fully as possible therein the reasons why such person should be transferred from the state hospital to the state training school, and all three copies of such certificate shall be signed by the superintendent and all physicians of the hospital who have examined and observed such person while in said hospital. One copy of such certificate shall be retained in the files of the hospital and one copy thereof shall be transmitted to the clerk of the district court of the county from which such person was committed to the state hospital.

(3) The clerk of said district court, upon receiving such copy of certificate, shall immediately give written notice to the relatives or guardian whose names are shown in the proceedings for the commitment of such person to the state hospital, or disclosed by any guardianship proceedings with regard to such person in such court, stating briefly the contents of such certificate and purpose thereof.

(4) Any such relative or guardian may make and file with the clerk of such court, within ten (10) days after the date of such notice, written protest or objection to the proposed transfer. If any such written protest or objection is filed within such time, the clerk of the court shall notify the district judge thereof, and such judge shall fix such time and place for the hearing of such protest and objection in open court as will give reasonable opportunity for the production and examination of witnesses. If no such protest or objection is filed within such time, or if a protest or objection is filed within such time and after a hearing thereon the judge shall make an order approving such transfer, the transfer may be made, but if such protest or objection is filed and after a hearing thereon the judge makes an order disapproving such transfer then the transfer shall not be made.

(5) The clerk of the court shall, if no protest or objection is filed within the time provided, transmit a written notice, in duplicate to the superintendent of the state hospital that no protest or objection has been filed, and if a protest or objection has been filed and a hearing had thereon such clerk shall immediately after the making of any order approving or disapproving such transfer, make a certified copy of such order, in duplicate, and transmit both thereof to the superintendent of such hospital.

(6) Upon receiving such written notices that no protest or objection has been filed, or upon receiving certified copies of an order approving

such transfer, one of such notices or certified copy of order shall be placed in the files of the state hospital, and the superintendent of such hospital may then have an attendant of the hospital take such person and deliver him to the superintendent or person in charge of such training school, together with a copy of such certificate with a copy of such notice or certified copy of order attached thereto, to the superintendent or person in charge of such training school and the same shall be his authority for receiving and keeping such person, and shall take the place of any commitment thereto. The cost of transporting such person from the hospital to the training school shall be paid out of funds appropriated for the maintenance of the state hospital.

History: En. Sec. 4, Ch. 76, L. 1943.

38-302. Admission of certain inmates at Montana state hospital to state training school. If any inmate of the Montana state hospital is not so far disordered in mind as to endanger health, person or property but by reason of being feeble-minded is a proper person for admission to the Montana state training school, such person may be admitted to the Montana state training school by proceedings in the district court of the county in which said Montana state hospital is located, such proceedings to be in compliance with the laws relating to the admission to said Montana state training school.

History: En. Sec. 1, Ch. 10, L. 1943.

38-303. Expenses of examination and transportation. The expenses of examination and transportation of such person shall be paid by the Montana state hospital.

History: En. Sec. 2, Ch. 10, L. 1943.

38-304. Expenses of clothing. The expenses of clothing of such person, after admission to the Montana state training school, shall be paid by the county from which such person was committed to the Montana state hospital, upon the rendering of a sworn itemized account of said expenses and the county in turn shall collect in its own name from the parents, guardian or estate of such person, provided they are financially able to meet such expenses. Such person, whether a minor or adult, shall remain such county charge as long as he or she is in the Montana state training school.

History: En. Sec. 3, Ch. 10, L. 1943.

CHAPTER 4

EXAMINATION AND COMMITMENT OF PERSON AS MENTALLY DERANGED BUT NOT DANGEROUS—VOLUNTARY APPLICATION FOR ADMISSION

- Section 38-401. Examination of person mentally deranged but not dangerous—physician's certificate.
 38-402. Judge's order—observation and examination.
 38-403. Supplemental order when more time for observation necessary.
 38-404. Release—certificate by superintendent.
 38-405. If commitment advisable, procedure—disposition of certificates.

- 38-406. Voluntary application for admission to state hospital—procedure.
- 38-407. Trial by jury, when.
- 38-408. Duty of clerk of district court.
- 38-409. Investigation by board of public welfare—order by district judge.
- 38-410. Determination of financial ability—procedure.
- 38-411. Maximum charges.
- 38-412. Later commitment—court to make order relative to charges.

38-401. Examination of person mentally deranged but not dangerous—physician's certificate. When an affidavit has been made, warrant issued, hearing had thereon and examination made of the person named in such affidavit and warrant, in accordance with the provisions of sections 38-201 to 38-205, inclusive, the physicians attending such hearing and making such examination, if they conclude that there is reason to believe that such person is disordered in his mind to some extent, but not to such an extent as to endanger health, person or property, must make a certificate on a form prescribed by the superintendent of the Montana state hospital, showing as near as possible:

1. That while they do not believe such person to be disordered in his mind to such extent as to endanger health, person or property, they do believe that such person may be disordered in his mind to such an extent that he should be admitted to the Montana state hospital for further examination and observation.

2. The premonitory symptoms, apparent cause of such disordered mind and the extent and duration thereof.

3. The nativity, age, residence, occupation and previous habits of such person.

4. The place from whence he came, and the length of time he has resided in this state.

5. The names of the nearest relatives, if known, and the name of any guardian of such person, if there be one, with their names and post-office addresses.

Such certificate must be filed in the office of the clerk of the district court of the county in which such hearing is held.

History: En. Sec. 1, Ch. 157, L. 1943.

Cross-Reference

Application of Montana Rules of Civil Procedure to this chapter, sec. 93-2711-7.

38-402. Judge's order—observation and examination. If the physicians' certificate provided for in section 38-401 is made and filed, the judge shall make an order directing that a person named therein shall be placed in the Montana state hospital for such time as he may deem necessary, but which shall not be less than two (2) nor more than four (4) weeks, for observation and for further examination for the purpose of determining whether he is disordered in his mind, and if so, whether or not his mind is disordered to such an extent as to require that he should be committed to such hospital, which order shall designate the person to take him to such hospital. Certified copies of the physicians' certificate and of such order shall be given the person designated in such order, and the person so designated shall deliver such person to the Montana state

hospital and shall at the same time deliver to the superintendent thereof said certified copies of physicians' certificate and order and the same shall be the authority of such superintendent for receiving, keeping and detaining such person in such hospital for the time specified in said order.

History: En. Sec. 2, Ch. 157, L. 1943.

38-403. Supplemental order when more time for observation necessary.

When any person is received at the Montana state hospital for observation under any order of a district judge made in accordance with the provisions of section 38-402, such person may be kept in such hospital not exceeding the maximum length of time specified in said order, during which time the superintendent and physicians of such hospital shall give the person such examinations, tests, and observation and such treatment, if any, as they may deem necessary and required in order to ascertain and determine and improve his mental condition; provided, that if it shall appear to such superintendent and physicians, before the expiration of such maximum time specified in such order, that such time is not sufficient for them to determine or improve the mental condition of such person, the superintendent shall so notify in writing the district judge who made such order, and such district judge or any district judge sitting or acting in his place, shall then make a supplemental order authorizing the keeping and detention of such person in such hospital for such additional length of time, not exceeding four (4) weeks in addition to the time specified in the original order. Such written notice from the superintendent and such order shall be filed in the office of the clerk of the district court, and such clerk must immediately make a certified copy thereof and transmit the same to the superintendent of said hospital and such certified copy of order shall be the authority for such superintendent to keep and detain such person in said hospital for the time specified in such order.

History: En. Sec. 3, Ch. 157, L. 1943.

38-404. Release—certificate by superintendent. If, while any person is being kept and detained in the Montana state hospital under any order, or orders, made in accordance with the provisions of sections 38-402 and 38-403, the superintendent and physicians at such hospital, from their examinations, tests and observations of such person, shall conclude and determine either that he is not disordered in his mind, or that he is disordered in his mind but not to such an extent as to justify or require that he be ordered committed to such hospital, the superintendent shall release and discharge him from said hospital, and a certificate, in duplicate, shall be made so stating and reciting, and further stating and reciting that for the reasons stated in such certificate the person named therein has been released and discharged from such hospital, with the date of such discharge and release, each of which copies shall be dated and signed by such superintendent. One (1) copy of such certificate shall be retained in the files of the hospital and the other copy thereof shall be transmitted to the clerk of the district court of the county in which the hearing of such person was had and by such clerk filed as a part of the records of such proceeding.

History: En. Sec. 4, Ch. 157, L. 1943.

38-405. If commitment advisable, procedure—disposition of certificates.

(1) If, while any person is being kept and detained in the Montana state hospital under any order or orders, made in accordance with the provisions of sections 38-402 and 38-403, the superintendent and physicians of the hospital, from their examinations, tests and observations of such person shall conclude and determine that such person is disordered in his mind to such an extent as to justify and require that he be ordered committed to such hospital, the superintendent shall make out, in duplicate, a certificate so stating and also stating in as much detail as may be deemed necessary and proper, the apparent cause or class of such disorder, its progress, the probable duration and condition of the disease and the probable result of any treatment which may be given him in such hospital. Each copy of such certificate shall be signed by the superintendent and by each physician of the hospital who has taken part in the examinations, tests and observations of such person.

(2) One (1) of said certificates shall be retained in the files of the hospital and the other copy shall be transmitted to the clerk of the district court of the county in which the hearing was held. Upon receipt of such certificate by said clerk of the district court he shall file such certificate and call the same to the attention of the district judge who made the order for such person to be placed in said hospital for observation, or to the attention of any district judge of the judicial district in which such county is situated, or to the attention of any district judge who is sitting or acting in place of the judge who made the order directing that such person be placed in said hospital for observation, and as soon as possible thereafter such district judge must make an order in duplicate that such person be committed to and retained and confined in the Montana state hospital. Both copies of such order must be delivered to the clerk of the court who must file and record one (1) thereof and transmit the other to the superintendent of such hospital which shall be the authority of such superintendent to keep, detain and confine such person in such hospital. All of the provisions and requirements of section 38-208 applicable thereto shall apply to all orders made under the provisions of this section.

History: En. Sec. 5, Ch. 157, L. 1943.

38-406. Voluntary application for admission to state hospital—procedure.

(1) Any resident of this state may make voluntary application for admission to the Montana state hospital in order to have examinations, tests and observations and treatment of his mental condition. Such application shall be in writing and made in duplicate on a form prescribed by the superintendent of such hospital, and if approved by any physician licensed to practice medicine in this state, both copies thereof shall be presented to a judge of a district court who shall enter his written approval on each thereof upon the condition that the applicant, if admitted to such hospital, may be received and kept and retained therein for observation for a period of at least four (4) months, unless sooner released therefrom by the superintendent thereof. No entry with regard thereto shall be made in any of the court's records. Upon presentation of both copies of such application to the superintendent of such hospital such superintendent

shall cause such person to be examined by the physicians connected with the hospital, and if it shall appear to such physicians, from such examinations, that such person is in such mental condition, or condition of mind as to warrant the placing of such person under observation and giving him such further examination and tests, and such treatment, if any, as may be deemed necessary, the superintendent shall receive such person into the hospital and keep and detain him therein for such purposes for a period of not exceeding four (4) months.

(2) If at any time before the expiration of such four (4) months period the superintendent and physicians making and giving him such examinations, tests, observation, and treatment, if any, shall determine and conclude that such person is not disordered in his mind, or is disordered in his mind but not to such an extent as to justify or require his commitment to such hospital, the superintendent shall return both copies of such application to him and release him from the hospital. But if at any time before the expiration of such four (4) months period the superintendent and physicians of the hospital making and giving such person such examinations, tests, observations, and treatments, if any, shall determine and conclude that such person is disordered in his mind to such an extent as to justify and require that he be committed to such hospital, the superintendent shall make and prepare a certificate, in duplicate, in substantially the same form and containing substantially the same statements, particulars and information as required by the certificate provided for in section 38-405, and signed in the same manner. One (1) copy thereof shall be retained in the files of the hospital and the other copy, together with a copy of the original application, shall be transmitted to the clerk of the district court of the county from which such person was received, who shall file the same, and immediately call the same to the attention of a district judge of such county, or to a judge sitting and acting in his place. Such district judge shall then make an order in duplicate that such person be committed to and retained and confined in the Montana state hospital. Both copies of such order shall be delivered to the clerk of the district court who must file and record one (1) thereof and transmit the other to the superintendent of such hospital which shall be the authority of such superintendent to keep, detain and confine such person to such hospital. All of the provisions and requirements of section 38-208, applicable thereto, shall apply to all orders made under the provisions of this section. The copy of application and the certificate of the superintendent of such hospital shall take the place and be in lieu of and equivalent in every respect to the affidavit and physicians' certificate provided for in sections 38-201 and 38-206.

History: En. Sec. 6, Ch. 157, L. 1943;
amd. Sec. 1, Ch. 33, L. 1953.

38-407. Trial by jury, when. Whenever any order is made under the provisions of section 38-405 or of section 38-406 committing any person to the Montana state hospital, if such person, or any relative, or friend, or guardian of such person, if there be one, is dissatisfied with such order he may, within ten (10) days after the making of such order, demand that

the question of his sanity be tried by a jury, before the district court of the county from which he was committed, such demand must be made in writing, served upon the county attorney, and filed with the clerk of the district court of such county. Upon such demand being made, served and filed a trial must be had in the manner provided by section 38-213, and all of the provisions of such section applicable thereto shall apply to such trial and proceedings in connection therewith.

History: En. Sec. 7, Ch. 157, L. 1943.

Collateral References

Constitutional right to jury trial in

proceeding for adjudication of incompetency or insanity or for restoration. 33 ALR 2d 1145.

38-408. Duty of clerk of district court. Whenever any order made by a district judge under the provisions of either section 38-405 or section 38-406 has been filed by a clerk of the court, such clerk must immediately notify in writing the county board of public welfare of such county, of the making of such order.

History: En. Sec. 8, Ch. 157, L. 1943.

38-409. Investigation by board of public welfare—order by district judge. As soon as any order made by a district judge under the provisions of either section 38-405 or section 38-406 has been filed by the clerk of the district court, such clerk must immediately transmit or deliver to the county board of public welfare of such county a copy of such order. Upon receipt of such copy of order it shall be the duty of some member of the staff of such county board of public welfare to make an investigation for the purpose of ascertaining the financial condition of the person named in such order, the property, value thereof, and income therefrom, if any, if such person be the owner of any property, and the names of the persons, if any, legally liable for the care, support and maintenance of such person, and make a written report to the district judge who made such order. Upon receiving such report the district judge shall make such order as he may deem proper with regard to payment to the Montana state hospital for maintenance, care and treatment of the person named in such order while such person remains in said hospital, but if such order direct that such payment be made out of any estate of such person, or by persons legally liable for his care and maintenance the amount fixed therein shall not exceed one dollar (\$1.00) per day.

History: En. Sec. 9, Ch. 157, L. 1943.

Collateral References

Liability of incompetent's estate for

care and maintenance furnished by public institution or hospital before incompetent's acquisition of any estate or property. 33 ALR 2d 1257.

38-410. Determination of financial ability—procedure. At the time the judge makes his order directing that a person who has signed a voluntary application for admission to the Montana state hospital be admitted to said hospital he shall follow the same procedure relative to determining the financial ability of such person as set forth in section 38-214 and the clerk of the district court and the county board of public welfare shall also follow the same procedure as set forth in section 38-214.

History: En. Sec. 1, Ch. 129, L. 1955.

44 C.J.S. Insane Persons § 75.

Collateral References

29 Am. Jur. 181, Insane Persons, § 58.

Mental Health 71.

38-411. Maximum charges. The charge for the cost of care and maintenance of a person who is admitted to the Montana state hospital as a voluntary applicant shall not exceed the following amounts: Three dollars (\$3.00) per day for the first ninety (90) days from and after the date of the first admission, and thereafter not to exceed the sum of two dollars (\$2.00) per day.

History: En. Sec. 2, Ch. 129, L. 1955.

38-412. Later commitment—court to make order relative to charges. Should a voluntary applicant later be committed to the Montana state hospital by an order made by a district judge under the provisions of section 38-405 or section 38-406, he shall again make an order relative to the charges for the cost of care and maintenance in accordance with the aforementioned investigation and report and all the evidence submitted at the hearing on the voluntary application.

History: En. Sec. 3, Ch. 129, L. 1955.

CHAPTER 5

CONVALESCENT LEAVE OF PATIENTS

- Section 38-501. Exception as to application of act.
 38-502. Convalescent leave of patients from Montana state hospital.
 38-503. Permitting patient to leave.
 38-504. Termination of convalescent leave.
 38-505. Report by person under whom patient is placed on convalescent leave.
 38-506. Support of patient placed on convalescent leave, discharged by lapse of time.
 38-507. Clothing for patient on convalescent leave or discharged patient.

38-501. Exception as to application of act. The provision of this act shall not apply to any patient held upon an order of court or judge in a proceeding arising out of a criminal act.

History: En. Sec. 1, Ch. 145, L. 1941.

38-502. Convalescent leave of patients from Montana state hospital. The superintendent of the Montana state hospital may grant a convalescent leave to a patient under general conditions prescribed by the state board of commissioners for the insane.

History: En. Sec. 2, Ch. 145, L. 1941;
 amd. Sec. 1, Ch. 152, L. 1957.

38-503. Permitting patient to leave. A patient of the Montana state hospital may be permitted by the superintendent to leave the institution on convalescent leave and remain in the custody of a parent, relative, legal guardian or other person.

History: En. Sec. 3, Ch. 145, L. 1941;
 amd. Sec. 2, Ch. 152, L. 1957.

38-504. Termination of convalescent leave. All such patients, while on convalescent leave, shall remain in the legal custody, and under the control of the state board of commissioners for the insane, and at any time during such convalescent leave, upon evidence satisfactory to the superintendent or to the state board of commissioners for the insane, that convalescent leave should terminate, such patient must be returned to the Montana state hospital. The written order of the state board of commissioners for the insane, certified by the superintendent of the hospital, shall be sufficient warrant to any officer to retake and return such patient to actual custody in the Montana state hospital.

History: En. Sec. 4, Ch. 145, L. 1941;
amd. Sec. 3, Ch. 152, L. 1957.

38-505. Report by person under whom patient is placed on convalescent leave. The person to whom such person shall be placed on convalescent leave shall report the physical, moral and mental condition of the patient to the superintendent either in person or by writing as often and as fully as the superintendent may require, and subject to such recommendations and regulations as the state board of commissioners for the insane may determine. In case of failure so to report on request, the inmate may be returned to the Montana state hospital. The patient shall be accessible to representatives of the hospital.

History: En. Sec. 5, Ch. 145, L. 1941;
amd. Sec. 4, Ch. 152, L. 1957.

38-506. Support of patient placed on convalescent leave, discharged by lapse of time. The Montana state hospital placing a patient on convalescent leave as aforesaid shall not be liable for his support while on convalescent leave. Such liability shall devolve upon the legal guardian, parent, or person or persons under whose care the patient is placed on convalescent leave, or upon any other person legally liable for his support. The public welfare officials of the county where the patient resides or is found, shall be responsible for providing relief and care for such patient on convalescent leave who is unable to maintain himself, or who is unable to secure support from the person under whose care he was placed on convalescent leave, as for any other person in need of relief and care, under the provisions of the public welfare laws. The person under whose care the patient is placed on convalescent leave or any other person legally liable for his support, shall, if such convalescent leave be revoked, be liable for any expense incurred by the state or county in procuring the return of such patient to the hospital.

The superintendent of the Montana state hospital shall have the power and it shall be his duty to place on convalescent leave any patient under his control when he believes it to be for the best interests of such patient and society to do so. If any patient so placed on convalescent leave shall not be returned to said institution within a period of two (2) years thereafter, he shall be deemed discharged therefrom and entry shall be made accordingly in the records of the institution; and if any patient who has escaped from said institution shall not be returned thereto within two (2)

years thereafter, he shall be deemed discharged therefrom and an entry made accordingly in the records of said institution. Whenever a patient shall be discharged whether by convalescent leave continuing for a period of two (2) years or by having escaped and not having been returned within two (2) years, the superintendent of the Montana state hospital shall immediately notify in writing the judge of the court by which said patient was committed and no person so discharged shall be recommitted to the state hospital except by court order and upon proceedings as required by law for commitment in the first instance. Provided, however, that nothing herein contained shall be construed as a restoration of civil rights of persons so discharged or as a restoration to sanity, or to relieve the superintendent of the Montana state hospital from the obligation of supervising patients on convalescent leave to the extent of available facilities and finances.

History: En. Sec. 6, Ch. 145, L. 1941;
amd. Sec. 1, Ch. 149, L. 1953; amd. Sec.
5, Ch. 152, L. 1957.

38-507. Clothing for patient on convalescent leave or discharged patient. No patient or inmate shall be discharged or placed on convalescent leave from the Montana state hospital without suitable clothing adapted to the season in which he is discharged.

History: En. Sec. 7, Ch. 145, L. 1941;
amd. Sec. 6, Ch. 152, L. 1957.

CHAPTER 6

EUGENICAL STERILIZATION LAW

- Section 38-601. Eugenical sterilization law.
38-602. Definitions.
38-603. State board of eugenics created.
38-604. Duties of the state board of eugenics.
38-605. Responsibility for sterilization.
38-606. Consent of guardian or kin required before sterilization.
38-607. Liability of persons concerned in execution of act—penalty for unauthorized sterilization.
38-608. Purpose of acts not punitive.

38-601. (1444.1) Eugenical sterilization law. This act shall be known as the "Eugenical Sterilization Law."

History: En. Sec. 1, Ch. 164, L. 1923.

Collateral References

Insane Persons ⇨ 47.
44 C.J.S. Insane Persons § 58.

Asexualization or sterilization of criminals or defectives. 40 ALR 535.

Legal aspects of voluntary sterilization of man or woman. 93 ALR 573.

38-602. (1444.2) Definitions. For the purpose of the act the following terms (a) heredity, (b) procreate, (c) custodial institution, (d) inmate, (e) eugenical sterilization, are hereby defined as follows:

(a) "Heredity" in the human species is the transmission, through spermatozoon and ovum, of physical, physiological, and psychological qualities from parents to offspring.

(b) "Procreate" means to beget or to conceive offspring, and applies equally to males and females.

(c) "Custodial institution" is a habitation which provides food and lodging, restraint, treatment, training, care or residence for inmates declared mentally delinquent through constituted legal channels.

(d) An "inmate" is an idiot, feeble-minded, insane or epileptic person who is treated, trained, or cared for within a custodial institution.

(e) "Eugenical sterilization" is herein defined as vasectomy, or salpingectomy, or such adequate medical treatment which will surely and permanently nullify the power to procreate offspring, to achieve permanent sexual sterility and the highest therapeutic benefits to the patient.

History: En. Sec. 2, Ch. 164, L. 1923.

38-603. (1444.3) State board of eugenics created. The state board of eugenics is hereby created and established for the state of Montana. It shall consist of: The chief physician of each custodial institution, the president of the state medical association, a female member named by the state medical association, and the secretary of the state board of health, the last named to be chairman of the board.

History: En. Sec. 3, Ch. 164, L. 1923.

Collateral References

Insane Persons \hookrightarrow 50.

44 C.J.S. Insane Persons § 71.

38-604. (1444.4) Duties of the state board of eugenics. It shall be the duty of this board to approve or disapprove certificate of sterilization submitted to them by the chief physician of custodial institution of inmate as provided in section 38-605 and to review the decision of the said chief physician in case of nonconsent on the part of the guardian, or best friend as provided in section 38-606. This board is also hereby empowered to exercise general supervision of matters pertaining to sterilization, over the chief physician and assistants in custodial institutions, and require from them proper records and data for the determination of the efficiency, benefits and specific efforts of eugenical sterilization.

History: En. Sec. 4, Ch. 164, L. 1923.

38-605. (1444.5) Responsibility for sterilization. The sterilization shall be performed by, or under the supervision of the chief physician of the custodial institution of said inmate, whenever he, by his competent examination, and upon the approval of the state board of eugenics finds the said inmate or inmates, to fall within the above named class or classes; provided, however, that before this sterilization takes place it shall be the duty of the said chief physician to fill out appropriate certificate of said inmate or inmates to be sterilized and present same to the state board of eugenics and secure that board's approval thereof, (the approval to be evidenced by the appropriate endorsement on the back of said certificate by the secretary of said board).

History: En. Sec. 5, Ch. 164, L. 1923.

38-606. (1444.6) Consent of guardian or kin required before sterilization. Before making out the certificate mentioned in the above paragraph

it shall be the duty of the physician to secure the consent of the legal guardian of said inmate and in case such inmate has no legal guardian, then the consent of his or her nearest known kin within the state of Montana and if such inmate has no known kin within the state of Montana, then the consent of the custodial guardian of such inmate. In all cases when this consent is refused, it should be noted on the certificate by the chief physician, and it then becomes his duty to notify the inmate and his guardian, or nearest known kin within the state of Montana, and in case such inmate has no known kin within the state of Montana, then the custodial guardian of such inmate, of the proposed sterilization, setting a date for him or them to appear before the state board of eugenics and to show cause why the sterilization should not take place. It shall then be the duty of the state board of eugenics to withhold the approval of the sterilization of said inmate until the said board has heard and passed upon the merits of the objection. At the hearing it shall be the duty of the state board of eugenics either to approve or disapprove the sterilization.

Failure of complainants to appear at the hearing after due notice shall be considered as a waiver of all objections.

Upon the approval of the state board of eugenics, the secretary thereof shall endorse the approval on the back of the sterilization certificate of the inmate, and the chief physician shall cause sterilization to proceed as though consent were given.

All decisions of the state board of eugenics shall be appealable to the district court of the district in which the custodial institution of the inmate is located by the objecting party or parties hereinbefore mentioned filing a petition against the state board of eugenics in the said court, in which case sterilization proceedings shall be suspended until final disposition of the case by the court.

History: En. Sec. 6, Ch. 164, L. 1923.

Cross-Reference

Application of Montana Rules of Civil Procedure to this section, sec. 93-2711-7.

38-607. (1444.7) Liability of persons concerned in execution of act—penalty for unauthorized sterilization. Neither the members of the state board of eugenics, the chief physicians, nor assistants concerned, nor any other persons legally participating in the execution of the provisions of this act, shall be liable either civilly or criminally on account of said participation provided, however, that sterilization of the said inmate or inmates, by the chief physician of the custodial institution or his assistants, for other than the purpose named in the act, or by fraud or duress, or without the approval of the state board of eugenics, shall constitute a felony punishable by a fine of not more than \$1,000, or imprisonment in the state prison for no more than five years, or both.

History: En. Sec. 7, Ch. 164, L. 1923.

Collateral References

Insane Persons § 55.

44 C.J.S. Insane Persons § 75.

38-608. (1444.8) Purpose of acts not punitive. The purpose of said findings and orders of said board and any operation performed thereunder,

shall be for the betterment of the physical, mental, neural or psychic condition of said inmate, or to protect society from the menace of procreation by said inmate, and not in any manner as a punitive measure.

History: En. Sec. 8, Ch. 164, L. 1923.

CHAPTER 7

STATE HOSPITAL FOR INEBRIATES

- Section 38-701. Establishment of hospital for inebriates.
 38-702. Commissioners for insane to control hospital.
 38-703. Patients that may be admitted.
 38-704. Applications for commitment to hospital.
 38-705. Examination of applicant and commitment—dismissal of patient.
 38-706. Costs of examination and commitment.
 38-707. Charges for maintenance and treatment of patient.
 38-708. Financial condition of patient—liability of relatives.
 38-709. Detention and release of patient—arrest and return of patient.
 38-710. Rules and regulations of hospital.
 38-711. Furnishing liquor or drugs to patient a felony—penalty.

38-701. (1445) Establishment of hospital for inebriates. There shall be established at the Montana state hospital at Warm Springs a department of said institution, which shall be called the state hospital for inebriates, and shall be used for the detention, care, and treatment of all persons suffering from mental affliction occasioned by the use of drugs or intoxicants.

History: En. Sec. 1, Ch. 139, L. 1911;
 re-en. Sec. 1445, R. C. M. 1921.

Collateral References

Hospitals⇒2.
 41 C.J.S. Hospitals § 4.

Cross-Reference

Application of Montana Rules of Civil
 Procedure to this chapter, sec. 93-2711-7.

38-702. (1446) Commissioners for insane to control hospital. The state board of commissioners for the insane shall have supervision and control of said state hospital for inebriates, and the officers, contractors, and employees of the Montana state hospital shall constitute the officers, contractors, and employees of said hospital for inebriates, and shall receive no additional compensation for their services in connection with said hospital.

History: En. Sec. 2, Ch. 139, L. 1911;
 re-en. Sec. 1446, R. C. M. 1921.

38-703. (1447) Patients that may be admitted. Said hospital for inebriates shall receive all patients regularly committed to it who are dipsomaniacs, inebriates, or who are addicted to the excessive use of morphine, cocaine, or other narcotic drugs, and who shall have been regularly examined and found of unsound mind as a result of the use of any such intoxicant or drug.

History: En. Sec. 4, Ch. 139, L. 1911;
 re-en. Sec. 1447, R. C. M. 1921.

Collateral References

Drunkards⇒4.
 28 C.J.S. Drunkards § 7.

38-704. (1448) Applications for commitment to hospital. Applications for commitment to said hospital for inebriates shall be made to the judge of the district court of the district which embraces the county in which the person whom it is proposed to commit resides, and said application may be made in person by any dipsomaniac, inebriate, or user to excess of morphine, cocaine, or other narcotic drug, or may be made against any such person by any other person.

History: En. Sec. 5, Ch. 139, L. 1911;
re-en. Sec. 1448, R. C. M. 1921.

Collateral References

28 Am. Jur. 673, 678, Insane and Other
Incompetent Persons, §§ 27, 35.

38-705. (1449) Examination of applicant and commitment—dismissal of patient. On presentation of the application provided for in the preceding section, unless made in person by an inebriate, dipsomaniac, or user to excess of a narcotic drug, the judge shall issue an order, which may be served by any peace officer, directing him to bring the accused person before him for examination, and on the appearance of the accused the judge shall proceed in the manner now provided by law for the examination of insane persons. The accused may be represented by counsel, and the judge may, if he deems it necessary, require the county attorney of the county where the hearing is had to attend and assist in such hearing. In case said application be voluntarily or involuntarily made, and said judge shall determine that the accused is a proper person to be committed to said hospital for inebriates, he shall make the order committing him thereto; otherwise he shall be discharged. The term of detention and treatment shall be until the patient is cured; provided, however, that the superintendent of such hospital may discharge any person committed to said hospital when satisfied that such person is not receiving substantial benefit from further hospital treatment.

History: En. Sec. 6, Ch. 139, L. 1911;
re-en. Sec. 1449, R. C. M. 1921.

38-706. (1450) Costs of examination and commitment. All costs and expenses incurred in the arrest and examination, and the costs and expenses incurred in taking the accused to said hospital, shall be paid in the manner now provided by law for the arrest, examination, and commitment of persons to the Montana state hospital.

History: En. Sec. 7, Ch. 139, L. 1911;
re-en. Sec. 1450, R. C. M. 1921.

38-707. (1451) Charges for maintenance and treatment of patient. The cost for care and maintenance of all persons committed to the Montana state hospital for inebriates shall not exceed the following amounts: Three dollars (\$3.00) per day for the first ninety (90) days from and after the date of the first admission, and thereafter not to exceed the sum of two dollars (\$2.00) per day. Should the person admitted, or the persons legally liable for his support, be found to be financially unable to pay for the cost of care and maintenance the same shall be a proper charge against the county from which the patient is admitted.

History: En. Sec. 8, Ch. 139, L. 1911;
re-en. Sec. 1451, R. C. M. 1921; amd. Sec.
1, Ch. 130, L. 1955.

Collateral References

28 Am. Jur. 682, Insane and Other Incompetent Persons, §§ 42 et seq.

38-708. (1452) Financial condition of patient—liability of relatives. (1) Whenever an examination or hearing for committal to the state hospital for inebriates is had and the person is adjudged and ordered to be confined in the state hospital for inebriates, it shall be the duty of the judge, the clerk of the district court and the county board of public welfare to determine the financial condition of the person admitted and the persons legally liable for his support, and to make an order relative to the payment of the charges for the cost of care and maintenance in accordance with the provisions of section 38-214.

History: En. Sec. 9, Ch. 139, L. 1911;
re-en. Sec. 1452, R. C. M. 1921; amd. Sec.
2, Ch. 130, L. 1955.

care and maintenance furnished by public institution or hospital before incompetent's acquisition of any estate or property. 33 ALR 2d 1257.

Collateral References

Liability of incompetent's estate for

38-709. (1453) Detention and release of patient—arrest and return of patient. All persons so committed may be detained in said hospital two years; but when it shall appear to the superintendent of said hospital for inebriates that any person held in said hospital will not continue to be subject to dipsomania or inebriety, or will be sufficiently provided for by himself or his guardian, relatives, or friends, the superintendent may issue to such person a permit to be at liberty, upon such conditions as he may deem best, and he may revoke said permit at any time previous to its expiration. The violation by the holder of such permit of any of the terms or conditions of the same shall of itself make said permit void.

When any permit granted under the provisions of this section has become void in any manner, the superintendent may issue an order authorizing the arrest of the holder or holders of such permit and their return to the hospital, and such order of arrest may be served by any officer authorized to serve criminal process in any county in this state. Any person at liberty from the hospital upon a permit, as aforesaid, may voluntarily return to the hospital and put himself in the custody of the superintendent. The holder of such permit, when returned to said hospital as aforesaid, whether voluntarily or otherwise, shall be detained therein according to the term of his original commitment.

History: En. Sec. 10, Ch. 139, L. 1911;
re-en. Sec. 1453, R. C. M. 1921.

38-710. (1454) Rules and regulations of hospital. The rules and regulations in force at the Montana state hospital shall be the rules and regulations for said state hospital for inebriates.

History: En. Sec. 11, Ch. 139, L. 1911;
re-en. Sec. 1454, R. C. M. 1921.

Collateral References

Hospitals 6.
41 C.J.S. Hospitals § 5.

38-711. (1455) Furnishing liquor or drugs to patient a felony—penalty. Any person who shall furnish any patient of said hospital for inebriates any

intoxicating liquor or narcotic drug, except upon the written prescription of the superintendent, shall be guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for a period of not less than six months nor more than five years, or by a fine of not less than five hundred dollars nor more than one thousand dollars. Any person who shall knowingly furnish any intoxicating liquor or narcotic drug to one who has been discharged from said hospital as cured, except upon the written prescription of a reputable practicing physician, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty dollars and not more than one thousand dollars.

History: En. Sec. 12, Ch. 139, L. 1911;
re-en. Sec. 1455, R. C. M. 1921.

Collateral References

Intoxicating Liquors 161; Poisons 9.
48 C.J.S. Intoxicating Liquors § 258;
72 C.J.S. Poisons § 7.

CHAPTER 8

MONTANA STATE TRAINING SCHOOL AND HOSPITAL

- Section 38-801. Montana state training school and hospital established.
38-802. Purposes and objects of school.
38-803. Powers and duties of state board of education.
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38-805. Eligibility for admission—exclusions.
38-806. Applications for admission, contents of.
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38-808. Investigation by county welfare board.
38-809. Duty of board as to approved applications—board required to determine amount paid by person admitted or parents.
38-809.1. Investigation of financial conditions of persons liable for support and maintenance of person presently in school—change in order for payment.
38-810. Hearing by judge of district court—notification by county clerk.
38-811. Same—procedure—approval of application—physician's statement.
38-812. Citation to persons liable to testify as to financial condition—order for support.
38-813. Approval of applications limited to room available.
38-814. Transfer of certain persons to state hospital—disposition of copies—court's order.
38-815. Cost of hearing and transportation of persons admitted to school.
38-816. Persons admitted to school—how removed.
38-817. Term of members of executive board.
38-818. Repealing clause—saving clause as to commitments and orders.
38-819. Procedure for commitment of certain inmates of state training school to Montana state hospital.

38-801. Montana state training school and hospital established. That the institution heretofore established at Boulder, in Jefferson county, state of Montana, as a training school and hospital for the education, training and detention of subnormal minors and adults and epileptics, shall be known and designated as the "Montana state training school and hospital," and shall be under the general direction, supervision and control of the state board of education, with a local executive board appointed in the manner, and having the powers and duties granted to and imposed upon such local executive board by the provisions of sections 75-302 to 75-309.

History: En. Sec. 1, Ch. 183, L. 1943;
amd. Sec. 1, Ch. 37, L. 1959.

Cross-Reference

Application of Montana Rules of Civil Procedure to this chapter, sec. 93-2711-7.

38-802. Purposes and objects of school. The purpose and object of such school shall be the mental, moral and physical education and training of subnormal persons whose defects prevent them from receiving proper instruction and training in the public schools, or who are so mentally deficient that they are incapable of managing themselves or their affairs independently with ordinary prudence or of being taught to do so, or who require control and education for their own welfare and the welfare of others, and minors whose intelligence will not develop without such care; epileptics and subnormal adults whose defects prevent them from taking care of themselves or their property, or who, from social standards, are a menace to society.

History: En. Sec. 2, Ch. 183, L. 1943.

38-803. Powers and duties of state board of education. The state board of education shall have the power to prescribe and adopt such rules and regulations, not inconsistent with the provisions of this act, as may be deemed necessary, with regard to the admission of both minors and adults to the school; the courses of study and training to be given any or all persons in such school, and generally for the proper maintenance and operation of such school. It shall be the duty of said board to appoint some suitable and qualified person as superintendent thereof and to provide the suitable staff and other employees therefor, and to fix the salary or compensation of the superintendent, members of the staff and other employees, subject to the approval of the state board of examiners.

History: En. Sec. 3, Ch. 183, L. 1943.

38-804. Powers and duties of superintendent. The superintendent of the school, under the direction of the state board of education, shall provide for the maintenance of a school department for the instruction and training of those inmates who are capable of being benefited by school instruction, and a custodial department for the care and custody of those who are not capable of being benefited by such school instruction, and may provide for giving any or all of the inmates of the school such instruction and training in unskilled labor, manual training, arts, crafts and trades as may be deemed suitable for such persons by said state board of education.

History: En. Sec. 4, Ch. 183, L. 1943.

38-805. Eligibility for admission—exclusions. There shall be admitted to the training school, in accordance with the provisions of this act, and such rules and regulations as may be adopted and provided by the state board of education with regard thereto, the following persons, if they have been residents of this state for at least one (1) year immediately preceding application for admission: Subnormal persons whose defects prevent them from receiving proper instruction and training in the public schools, or who are so mentally deficient that they are incapable of managing themselves or their affairs independently with ordinary prudence or of being taught to do so, or who require control and education for their own welfare and the welfare of others, and minors whose intelligence will not develop

without such care; epileptics and subnormal persons whose defects prevent them from taking care of themselves or their property, or who, from social standards, are a menace to society. Provided, however, that no person who is insane, or who requires hospitalization, or who is dangerously diseased in body, or who is suffering from any infectious or contagious disease, or of confirmed immorality, shall be admitted to such school.

History: En. Sec. 5, Ch. 183, L. 1943.

38-806. Applications for admission, contents of. Applications for admission to the training school shall be made on forms prescribed by the superintendent thereof, and each application for admission must give the full name of the person for whom made, residence and length of time a resident of this state, age, sex, race, general mental, moral and physical condition and family history, names of parents, if any, and residences, if known, or guardian, if any, and residence, the names and residences of the nearest relatives, other than parents, if any, and known, the name of the person making the application and relationship, if any, to the person for whom made, and such other additional information as the superintendent of such school may deem necessary and proper, and must be signed by the applicant and verified under oath. Application for admission of any person to such school may be made by any parent, guardian or relative or by any person legally entitled to the custody and control of such person; by a county health officer or county physician or county attorney or by any member of the staff of the state public welfare department or of a county public welfare board, or by any reputable citizen.

History: En. Sec. 6, Ch. 183, L. 1943.

38-807. Same—filing of—proviso. If such application is made by the parents, or by one thereof, if the other be dead or absent from the state, or if not made by, but there is endorsed on such application the approval and consent of such parents or parent to the person named in such application being placed in such school, and which approval and consent is signed by such parents or parent, such application shall be made to and filed with the county public welfare board of the county in which such person resides. If such application is not made by such parents or parent, and such approval and consent has not been endorsed on the application and signed as herein provided, then such application must be made to and filed in the district court of the county in which such person resides. Provided, that if the custody and control of any such person has been given, by a court of competent jurisdiction, to one parent, the signing of such approval and consent herein provided for by such parent shall be sufficient.

History: En. Sec. 7, Ch. 183, L. 1943.

38-808. Investigation by county welfare board. Whenever an application for admission of any person to such training school has been made, and filed with county board of public welfare, or has been filed in the office of the clerk of any district court and the clerk of such court has notified the county board of public welfare of such county of the filing thereof, as hereinafter provided, some member of the staff of such county board of

public welfare must, without delay, make an investigation to ascertain the financial condition of the person named in such application, the property and value thereof, if any owned by him, the income, if any therefrom, the names and residences of parents or other relatives, if any, legally liable for his support and maintenance and their financial condition and ability to pay for his transportation and for his care, maintenance, clothing, and other necessary personal expenses at such school, and shall make a written report thereof in duplicate to said county board of public welfare, and the county clerk of such county shall, whenever any such application is received by such board, notify the county physician thereof, giving the name and address of the person named in such application, and the names and residences of the parents, guardian and relatives, if any named therein; and such county physician shall, without unnecessary delay, make an examination of him for the purpose of ascertaining his mental condition, and whether or not he is a proper person to be placed in such school, and shall make and file with such county board of public welfare a written report of such examination.

History: En. Sec. 8, Ch. 183, L. 1943.

38-809. Duty of board as to approved applications—board required to determine amount paid by person admitted or parents. (1) When an application has been filed with a county board of public welfare, and the reports of the member of the staff investigating such application, and the report of the county physician of his examination of the person named therein, have been filed with such board, if such board finds and determines that he is a proper person to be placed in such training school and hospital, such board shall ascertain from the superintendent thereof if there is room for his accommodation in such school, and if there is, the board may then make an order approving such application, and authorizing the transportation to and the placing of such person in such school, and if it appears to such board that the person named in said application has means, money or property out of which the cost of his transportation, care, maintenance, clothing and other necessary personal expenses in such school, or some part thereof could be paid, or that he has parents, or other relatives legally liable for his support and maintenance who are financially able to pay for such transportation, care, maintenance, clothing and other necessary personal expenses while in such school, or a part thereof, the board shall make an order requiring the person or persons having possession of any of said moneys, means or property, or such parents or other relatives, to appear before such board, at a time and place fixed in said order, to testify before such board regarding any such money, means or property of such person or the financial ability of such parents or other relatives to pay for such transportation, care, maintenance, clothing and other necessary expenses.

(2) After hearing such evidence and examining the report of the investigator filed with such board, the board shall fix and determine the amount, if any, to be paid for such transportation, maintenance, care, clothing and other necessary expenses while in such school out of any money, means or property of such person, or by his parents or other rela-

tives who are legally liable for his support and maintenance; provided, however, that the amount payable per day, under such order, shall not exceed the average per capita operating cost per day for such school as certified by the superintendent; provided further that the amount so certified by the superintendent shall be the amount fixed by such order, unless the board shall affirmatively determine after investigation that a lesser amount should be payable.

(3) The board shall have the power at any time, at the request of any person concerned or of its own motion, to review and change any order for support so made, and may, if necessary, require a further hearing and investigation as provided for in subparagraph (1) of this section.

(4) If any person liable to make any payments provided for by this section shall fail or refuse to make such payments, the said payments shall be collectible by a civil suit brought in the name of the state of Montana. The county attorney of the county in which the order was made, or in which such person resides, is hereby authorized and required to demand payment of such person and institute a suit, if necessary, to recover such payments.

History: En. Sec. 9, Ch. 183, L. 1943;
amd. Sec. 1, Ch. 186, L. 1953; amd. Sec.
1, Ch. 73, L. 1959.

38-809.1. Investigation of financial conditions of persons liable for support and maintenance of person presently in school—change in order for payment. As soon as possible after the effective date of this act the superintendent of the Montana state training school and hospital shall certify to the boards of county commissioners of the various counties of the state of Montana the names of all persons who have been committed from their respective counties, and of all persons residing within such counties who are responsible for payments for care and maintenance of any person committed to the school. It shall be the duty of each such board of county commissioners to require a new investigation of the financial condition and resources of each such person liable for payments and, if such board shall determine that the payments made by such person should be charged in accordance with the standard provided in section 38-809, a new order requiring such changed payments shall be entered by such board.

History: En. 38-809.1 by Sec. 2, Ch. 73,
L. 1959.

38-810. Hearing by judge of district court—notification by county clerk. If the application is filed in the office of the clerk of the district court such clerk shall immediately notify the county board of public welfare of such filing, with the name and residence of the person for whom such application is made, the name and residence of the person making the application and the names and residences of all parents and other relatives given therein, if any; and shall also call such application to the attention of the judge of such court. The judge shall make an order fixing a time and place for hearing of such application in open court, and the clerk shall

mail copies thereof to the person making the application and to all parents and other relatives named in such application, if any.

History: En. Sec. 10, Ch. 183, L. 1943.

38-811. Same—procedure—approval of application—physician's statement. Upon the hearing on such application the court may name two (2) physicians, one (1) of whom may be the county physician, who shall, with the assistance of the county attorney and any attorney appearing at such hearing for the purpose of representing any parents, or other relatives, or guardian of such person, examine such person and submit to the court in writing, the facts as found by them and their recommendations. If the court concludes therefrom that such person is a proper person to be placed in said training school, and it further appears to the court from information obtained from the superintendent of such school that there is room for his accommodation in such school, the court shall make an order approving such application and authorizing the placing of such person in such school. The statement of facts and conclusions of said physicians and any order made by the court approving such application shall be filed in the office of the clerk of the court. The clerk of the court shall make certified copies of such application, the statement of facts and the order of the court and deliver the same to the officer or person taking such person to said training school, who shall deliver such certified copies to the superintendent of such school and the same shall be his authority for receiving and keeping such person in such school.

History: En. Sec. 11, Ch. 183, L. 1943.

38-812. Citation to persons liable to testify as to financial condition—order for support. If it appears to the court on such hearing that the person named in such application has money, means or property out of which the cost of transportation and care, maintenance, clothing and other necessary personal expenses of such person in such school, or some part thereof could be paid, or has parents or other relatives legally liable for his support and maintenance and financially able to pay the same, or a part thereof, a citation may be issued by the court to the person or persons having possession of such moneys, means or property, or any part thereof, and to said parents or other relatives, requiring them to appear and testify concerning such property, or their financial ability to pay for such transportation, care, maintenance, clothing and other expenses at such school, and on such hearing the court may make such order or orders as may be deemed proper for the payment thereof, or some part thereof, out of the moneys, means or property of such person or by such parents or other relatives, which order or orders shall be filed in the office of the clerk of the court, and such clerk shall make a certified copy thereof and deliver the same to the county board of public welfare; provided, however, that the amount payable per day under such order shall not exceed the average per capita operating cost per day for such school as certified by the superintendent; provided further that the amount so certified by the superintendent shall be the amount fixed by such order, unless the court shall

affirmatively determine after investigation that a lesser amount should be payable.

History: En. Sec. 12, Ch. 183, L. 1943; care and maintenance furnished by public
amd. Sec. 2, Ch. 186, L. 1953; amd. Sec. institution or hospital before incompetent's
3, Ch. 73, L. 1959. acquisition of any estate or property. 33
ALR 2d 1257.

Collateral References

Liability of incompetent's estate for

38-813. Approval of applications limited to room available. Before any county board of public welfare, or any court, or judge thereof, shall make any order approving any application and authorizing the person named therein to be placed in such school, said board, or judge, shall first ascertain by telephone or otherwise, from the superintendent of said school as to whether or not there is room to accommodate such person in said school; provided that if there is not room, applications for admission shall be granted in the order of their submission.

History: En. Sec. 13, Ch. 183, L. 1943.

38-814. Transfer of certain persons to state hospital—disposition of copies—court's order. (1) Whenever any person has been placed in such school under any order or commitment of a district court, or order of a county board of public welfare, and has been in such school for a period of not less than sixty (60) days, and the superintendent of such school believes from his observation of him and from his actions and conduct that he is disordered in his mind to such an extent that he is not a proper person to remain in such school but should be placed in the Montana state hospital, such superintendent shall notify in writing the judge of the district court authorizing his admission to such school, if admitted under an order or commitment of the district court, or the county board of public welfare if admitted under an order of such board, of such fact, and request that an order be made permitting him to be transferred to the state hospital for a period of at least six (6) weeks for examination, tests and observation for the purpose of ascertaining and determining his mental condition. If the order requested by said superintendent be made by the district court or by the county board of public welfare, duplicate copies of such order shall be made and certified by the clerk of the court if made by the court, or by the county clerk, if made by the county board of public welfare, and both of such copies shall be transmitted to such superintendent. Upon receipt of such certified copies of order such superintendent may transfer such person to the Montana state hospital, delivering one (1) of such copies of order to the superintendent of such hospital and retaining the other copy thereof in the files of the training school.

(2) If prior to the expiration of the period fixed in such order the superintendent and physicians of such hospital shall conclude and determine from their tests, examination and observation of such person, that he is so far disordered in his mind that he should be kept and detained in such hospital, the superintendent of such hospital shall make out a certificate, in triplicate, so reciting, and shall state in addition, in as much detail as necessary, the apparent cause or class of the disorder, probable duration

and condition of the disease and the probable result of any treatment which may be given to him in such hospital. Each of such copies shall be signed by the superintendent and by each physician who has taken any part in the examinations, tests and observations of such person. One (1) of such copies shall be retained in the files of the hospital and shall be the authority of the superintendent for keeping and detaining such person therein. One (1) copy shall be transmitted to the superintendent of the training school to be placed in the files of such school. One (1) copy shall be transmitted to the clerk of the district court of the county from which such person was sent to the training school, who shall file and record the same in the manner required by section 38-208, and such certificate shall take the place and be in lieu of and equivalent to, in every respect, the warrant, affidavit, physicians' certificate, and commitment provided for and required by sections 38-201, 38-202, 38-206 and 38-208.

(3) If, before the expiration of such period, the superintendent and physicians of such hospital shall conclude and determine from their tests, examinations and observations of such person that he is not disordered in his mind to such an extent as to require that he should be kept and retained in such hospital, but that he is a proper person to be kept and detained at such training school, a certificate, in triplicate, shall be made and signed by the superintendent of such hospital, so stating, one (1) copy thereof being retained in the files of such hospital, one (1) copy being transmitted to the clerk of the district court which made such order of transfer, or to the county board of public welfare of such county, as the case may be, and the remaining copy shall be delivered to the superintendent of the training school at the same time such person is returned to such school. The costs of transportation and all other expense and cost incurred in connection with the transfer of such person to the Montana state hospital, and his return to the Montana state training school, if returned thereto, shall be paid out of the moneys appropriated for such training school.

History: En. Sec. 14, Ch. 183, L. 1943.

38-815. Cost of hearing and transportation of persons admitted to school. The costs of hearing and transportation of persons admitted to the school shall be paid by the county from which admitted out of its poor fund. If any order has been made by a county board of public welfare, or district court, as provided in sections 38-809 and 38-812, requiring the parents, guardian, or any relative of any person to pay the whole or a part of the cost of his care, maintenance, clothing and other necessary personal needs, the superintendent of the school shall quarter-annually, at the end of each quarter, prepare and transmit to the board of county commissioners of such county an itemized account showing the name of such person, the number of days in the quarter for which payment is to be made, clothing and other necessary expenses and the amount thereof, and said board of county commissioners shall allow and pay it by warrant drawn against its poor fund payable to said training school, and the county, in turn, shall collect in its own name, from the parents, guardian or relatives, named and designated in such order. If any such order

shall be made to the effect that any such person has no property or estate out of which payment can be made, and has no parents, guardian or relatives financially able to pay any part of such cost of care, maintenance, clothing and other necessary needs, the county from which he was admitted shall be liable for such clothing and other necessary personal expenses, and the superintendent of the school shall quarter-annually, at the end of each quarter, prepare and transmit to the board of county commissioners of such county an itemized statement showing the amount to be paid therefor for such quarter, and said board of county commissioners shall allow and pay it by warrant drawn against its poor fund payable to such training school. All warrants received by the superintendent of the training school under the provisions of this section shall be transmitted to the state treasurer and the proceeds thereof shall be credited to the state general fund.

The provisions of this section shall apply to the payment for clothing and other necessary personal needs of persons theretofore admitted to and in such school on the date when this act takes effect.

History: En. Sec. 15, Ch. 183, L. 1943.

38-816. Persons admitted to school—how removed. No person admitted to such school under any order of a district court, or county board of public welfare, may be removed from said school, either permanently or temporarily, except upon the written order of the superintendent, or upon an order of any district court of the state, or order of the county board of public welfare of the county from which received, or in accordance with the provisions of section 38-814, and the provisions of this section shall apply to adults as well as minors therein. The costs of any court action for the removal of any person from such school shall be borne by the party bringing the action. Any order of the district court, pursuant to this act, may be reviewed by the supreme court, provided such appeal is taken within sixty (60) days after the making of such order. Whenever the superintendent believes that any person admitted to the training school does not properly belong in said institution or at the state hospital, he shall have authority to discharge or remove such person from the said institution.

History: En. Sec. 16, Ch. 183, L. 1943.

38-817. Term of members of executive board. The members of the executive board of the Montana state training school in office on the date when this act takes effect, shall continue to constitute such executive board and shall remain in office until the terms for which they were respectively appointed shall expire.

History: En. Sec. 17, Ch. 183, L. 1943.

38-818. Repealing clause—saving clause as to commitments and orders. Sections 1474 to 1483, inclusive, R. C. M., 1935, and all acts amendatory thereof, section 4 of chapter 43, session laws of 1937, and all other acts and parts of acts in conflict with this act, or any of the provisions hereof, are each and all thereof, hereby repealed; provided, however, that all commit-

ments and orders made by any and all of the district courts of this state, prior to the date this act takes effect, under and in accordance with the provisions of section 1476, Revised Codes of Montana, 1935, shall remain in full force and effect and shall not be affected in any manner whatever by the repeal of such section by this act, and all the provisions of this act, in so far as the same may be applicable, shall apply to all persons in such school under such commitments or orders at the time this act takes effect.

History: En. Sec. 18, Ch. 183, L. 1943.

38-819. Procedure for commitment of certain inmates of state training school to Montana state hospital. If any inmate of the Montana state training school shall be so far disordered in mind as to endanger health, person or property, such person may be committed to the Montana state hospital by proceedings against such person in the district court of the county in which said Montana state training school is located, said proceedings to be in compliance with the laws relating to the apprehension, examination, hearing and commitment of insane persons; the cost of such examination, commitment and taking of such person to the Montana state hospital must be paid by the said Montana state training school.

History: En. Sec. 1, Ch. 11, L. 1943.

CHAPTER 9

LEASES OF FARM LAND FOR STATE HOSPITAL AND STATE PENITENTIARY AUTHORIZED

Section 38-901. Emergency condition at state hospital declared.

38-902. State board of examiners authorized to enter into leases or option to purchase lands.

38-901. Emergency condition at state hospital declared. There is a serious emergency condition confronting the people of Montana in connection with the Montana state hospital at Warm Springs and the state penitentiary at Deer Lodge, in that said institutions do not have or control any good farm lands from which said institutions may produce food crops for the use of said institutions.

History: En. Sec. 1, Ch. 209, L. 1943.

38-902. State board of examiners authorized to enter into leases or option to purchase lands. The state board of examiners is hereby authorized and directed to enter into leases for, and/or leases with the option to purchase, such lands as the board may select and upon such terms and conditions as said board may determine to be for the best interest of the state.

History: En. Sec. 2, Ch. 209, L. 1943.

CHAPTER 10

STATE DEPARTMENT OF MENTAL HYGIENE

Section 38-1001. State department of mental hygiene created.

38-1002. Director and staff.

38-1003. Responsibility and duties.

38-1001. State department of mental hygiene created. There is hereby created a separate division of the state hospital to be designated as the state department of mental hygiene.

History: En. Sec. 1, Ch. 103, L. 1947.

38-1002. Director and staff. The superintendent of the state hospital shall act as the director of said department and shall have immediate supervision over the operation thereof. In addition to the director, the staff of said department shall consist of the assistant superintendent of the state hospital, such medical assistants and other employees of the state hospital as may be designated by the director, and such other medical specialists, psychologists, and social workers as may be appointed either permanently or for temporary periods by the director with the approval of the state board of commissioners of the insane.

History: En. Sec. 2, Ch. 103, L. 1947.

38-1003. Responsibility and duties. The state department of mental hygiene shall take cognizance of all matters affecting the mental health of the citizens of the state of Montana, and shall assume responsibility for the preventive mental hygiene activities and other activities of the state's mental health program. It shall make scientific and medical investigations relative to the incidence, cause, prevention, and cure of mental and nervous illnesses and shall collect and disseminate such information relating to mental hygiene as it considers proper for diffusion among the people. It shall prepare and submit plans for the development of mental health services in the state, and shall submit such plans to the surgeon general of the United States. It shall examine persons received into the state hospital and other persons who shall make application for examination, for the purpose of diagnosing and prescribing treatment of mental and nervous illnesses. It may establish and conduct temporary clinics in cities and towns in the state of Montana for the diagnosis of and prescription of treatment for mental and nervous illnesses of citizens of the state and for consultation with persons recuperating from mental or nervous illnesses and with the families of such persons, and for such purpose may rent office and clinical space in such cities and towns. The state department of mental hygiene is hereby authorized and empowered to receive from the United States, or agencies thereof, and from other agencies within and without the state, such grants or sums of money as may hereafter be allocated from the United States or agencies thereof, or from other agencies, to the state department of mental hygiene of Montana for the development of mental hygiene services within the state; and to use such moneys so received and other funds made available to such department, in the conduct of its operations and for the purchase of supplies, equipment and transportation units necessary to carry out the provisions of this act.

History: En. Sec. 3, Ch. 103, L. 1947.

CHAPTER 11

HOME FOR SENILE MEN AND WOMEN

Section 38-1101. Definitions.

38-1102 to 38-1105. Repealed.

- 38-1106. Care and custody of patient—cost of maintenance.
- 38-1107. Repealed.
- 38-1108. Transfer of patients from state hospital to home.
- 38-1109. Parole of patient—notice of parole, discharge, transfer, death or escape.
- 38-1110. False commitment—penalty.
- 38-1111. Petition for restoration to capacity.
- 38-1112. Lien for care of patients.

38-1101. Definitions. The following words and phrases when used in this act, unless the context clearly indicates otherwise, shall have the meanings ascribed to them in this section.

(a) "Senile person" means any person who by reason of unsoundness of mind due to advanced years, is in such condition of mind and body as to be a fit subject for care and treatment in a home for senile persons; except that no person who is afflicted with insanity, epilepsy or feeble-mindedness shall be regarded as a senile person, unless he is senile as above defined.

(b) "Superintendent" means the superintendent of the home for senile men and women.

(c) "Home" means the home for senile men and women.

(d) "Patient" means any person for whose commitment as a senile person, proceedings have been instituted or completed.

History: En. Sec. 6, Ch. 206, L. 1949.

Collateral References

Cross-Reference

Asylums 5.

7 C.J.S. Asylums § 7.

Application of Montana Rules of Civil Procedure to this chapter, sec. 93-2711-7.

38-1102 to 38-1105. Repealed—Chapter 230, Laws of 1959.

Repeal

These sections (Secs. 7 to 10, Ch. 206, L. 1949), relating to procedure for admission and commitment to the Montana

home for senile men and women, were repealed by Sec. 1, Ch. 230, Laws 1959, effective March 11, 1959.

38-1106. Care and custody of patient—cost of maintenance. Upon delivery of any person to the home, the patient shall be under the care, custody and control of the superintendent until discharged by the superintendent or by a court of competent jurisdiction.

The provision of the law applicable to the costs of the care and maintenance of persons otherwise committed and confined in the state hospital at Warm Springs shall be applicable likewise to the costs of the care and maintenance of senile persons.

History: En. Sec. 11, Ch. 206, L. 1949; amd. Sec. 2, Ch. 230, L. 1959.

care and maintenance furnished by public institution or hospital before incompetent's acquisition of any estate or property. 33 ALR 2d 1257.

Collateral References

Liability of incompetent's estate for

38-1107. Repealed—Chapter 230, Laws of 1959.

Repeal

This section (Sec. 12, Ch. 206, L. 1949), relating to the commitment to the state hospital of inmates of the home who be-

came violently insane, was repealed by Sec. 1, Ch. 230, Laws 1959, effective March 11, 1959.

38-1108. Transfer of patients from state hospital to home. The superintendent of the hospital at Warm Springs, Montana, is authorized to have examinations of the patients at that institution made by competent doctors for the purpose of ascertaining whether some patients there should be transferred to the home, and if as a result of such examinations any persons are found to be senile, the state board of examiners of the state of Montana is authorized to order their transfer from the state hospital at Warm Springs, Montana, to the home.

History: En. Sec. 13, Ch. 206, L. 1949;
amd. Sec. 3, Ch. 230, L. 1959.

Collateral References

Insane Persons \hookrightarrow 51.

44 C.J.S. Insane Persons § 72.

38-1109. Parole of patient—notice of parole, discharge, transfer, death or escape. Any senile person committed under this act will be paroled from the home to such persons upon such terms and under such conditions as may be prescribed by the superintendent.

When a patient is paroled, discharged, transferred to another hospital, dies, escapes or is returned, the superintendent having charge of the patient shall file notice thereof in the court of commitment.

History: En. Sec. 14, Ch. 206, L. 1949.

38-1110. False commitment—penalty. Whoever, for a corrupt consideration or advantage or through malice, shall make or join in or advise the making of any false petition or report or shall knowingly or willfully make any false representation for the purpose of causing or having a person admitted to the home as a senile person shall be guilty of a felony and punished by imprisonment in the state penitentiary for not more than one (1) year or by a fine of not more than one thousand dollars (\$1,000.00).

History: En. Sec. 15, Ch. 206, L. 1949.

38-1111. Petition for restoration to capacity. The patient who has been committed, or any person who considers himself aggrieved by any commitment, may petition the court of commitment. Upon the filing of such petition the court shall fix a time and place for hearing thereon. Ten (10) days' written notice of the hearing shall be given to the patient or to the superintendent and to such other persons and in such manner as the court may direct.

If the petition be filed by any person other than the superintendent, there shall be paid to the superintendent in advance of the hearing, all expenses in connection with the hearing in such amount as may be fixed by the superintendent for the transportation, board and lodging of the patient, and authorized attendants.

The court shall appoint two qualified physicians duly licensed to practice medicine in the state of Montana, neither of whom shall be the physician whose certificate accompanied the petition for commitment or who was appointed by the court at the time of the hearing on the petition for commitment, and who are not related to the patient, who shall be present at the hearing for restoration to capacity and shall thoroughly examine the patient. The patient shall be represented by counsel as pro-

vided in section 38-1107. The physicians' fees shall be paid in the same manner as in cases where patients now confined in the state hospital at Warm Springs, pay on petition for restoration to capacity. If the court shall determine upon proof submitted at the hearing, that the patient is not a senile person, the court shall order him restored to capacity and shall direct the superintendent to release the patient from the home. If restoration be denied, the patient shall be remanded to the superintendent.

History: En. Sec. 16, Ch. 206, L. 1949.

Compiler's Note

Section 38-1107, referred to above, was repealed by Sec. 1, Ch. 230, Laws 1959.

38-1112. Lien for care of patients. If any patient dies, who has been in the home and has not paid for the reasonable value of his care and treatment there, and leaves an estate in the state of Montana, the said state of Montana shall have a first lien on all such estate for the reasonable value of the care and treatment furnished the patient and it shall be the duty of the attorney general to file a creditor's claim for such an amount on behalf of the state of Montana.

History: En. Sec. 17, Ch. 206, L. 1949.

TITLE 39

INSTRUMENTS, ACKNOWLEDGMENT AND PROOF

Chapter 1. Acknowledgment and proof of instruments, 39-101 to 39-134.

CHAPTER 1

ACKNOWLEDGMENT AND PROOF OF INSTRUMENTS

- Section 39-101. By whom acknowledgments may be taken in this state.
39-102. Same—where and by whom acknowledgments may be taken.
39-103. By whom taken without the state.
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39-106. Acknowledgments and other notarial acts may be done by designated officers in armed services.
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39-128. Effect as evidence of instruments made and acknowledged before code takes effect—recording.
39-129. Validation of records erroneously executed or acknowledged—copies as evidence.
39-130. Deeds heretofore executed valid though not acknowledged.
39-131. Deeds made prior to 1900—presumption grantor had no wife living.
39-132. Validation of instruments omitting address of grantee, mortgagee or assignee—copies as evidence.
39-133. Validation of recorded instruments affecting real property regardless of defects in execution.
39-134. Validation of deeds not formally executed.

39-101. (6905) By whom acknowledgments may be taken in this state.
The proof of acknowledgment of an instrument may be made at any place within this state before a justice or clerk of the supreme court, or a judge of the district court.

History: For earlier acts relating to see Secs. 1-52, pp. 479-488, Bannack Stat.; conveyance and form of acknowledgments, Secs. 1-52, pp. 396-404, Cod. Stat. 1871;

Secs. 178-229, 5th Div. Rev. Stat. 1879;
Secs. 235-287, 5th Div. Comp. Stat. 1887.

This section En. Sec. 1600, Civ. C. 1895;
re-en. Sec. 4654, Rev. C. 1907; re-en. Sec.
6905, R. C. M. 1921. Cal. Civ. C. Sec.
1180. Based on Field Civ. C. Sec. 516.

Cross-References

Judges may take and certify acknowledgments, sec. 93-1004.

Mortgages of personal property, acknowledgment, sec. 52-302.

Mortgages of real property, acknowledgment of, sec. 52-205.

Private writings, manner of proof and acknowledgment, sec. 93-1101-19.

Recording, acknowledgment required, sec. 73-105.

References

Angell v. Lewistown State Bank et al.,
72 M 345, 351, 232 P 90.

Collateral References

Acknowledgment 9, 16.

1 C.J.S. Acknowledgments §§ 45, 60.

1 Am. Jur. 333, Acknowledgments, § 49.

39-102. (6906) Same—where and by whom acknowledgments may be taken. The proof of acknowledgment of an instrument may be made in this state within the city, county, or district for which the officer was elected or appointed, before either:

1. A clerk of a court of record; or,
2. A county clerk; or,
3. A notary public; or,
4. A justice of the peace; or,
5. A United States commissioner.

History: En. Sec. 1601, Civ. C. 1895;
re-en. Sec. 4655, Rev. C. 1907; amd. Sec. 1,
Ch. 10, L. 1913; re-en. Sec. 6906, R. C. M.
1921. Cal. Civ. C. Sec. 1181. Based on
Field Civ. C. Sec. 517.

Cross-References

Justices of the peace, power to take,
sec. 93-1004.

Notaries public may take, sec. 56-104.

References

Angell v. Lewistown State Bank et al.,
72 M 345, 351, 232 P 90.

Collateral References

1 Am. Jur. 333, Acknowledgments, § 49.

39-103. (6907) By whom taken without the state. The proof of acknowledgment of an instrument may be made without this state, but within the United States, and within the jurisdiction of the officer, before either:

1. A justice, judge, or clerk of any court of record of the United States; or,
2. A justice, judge, or clerk of any court of record of any state or territory; or,
3. A commissioner appointed by the governor of this state for that purpose; or,
4. A notary public; or,
5. Any other officer of the state or territory where the acknowledgment is made authorized by its laws to take such proof or acknowledgment.

History: En. Sec. 1602, Civ. C. 1895;
re-en. Sec. 4656, Rev. C. 1907; re-en. Sec.
6907, R. C. M. 1921. Cal. Civ. C. Sec.
1182. Based on Field Civ. C. Sec. 518.

Cross-Reference

Commissioners of deeds, acknowledgments by, sec. 56-202.

References

Gotzian & Co. v. Norris et al., 89 M 307,
315, 297 P 489.

Collateral References

Acknowledgment 17.

1 C.J.S. Acknowledgments § 49.

1 Am. Jur. 341, Acknowledgments, § 65.

39-103.1. Effect of acknowledgment outside state in accordance with other state's law. Notwithstanding any provision contained in Title 39 of the Revised Codes of Montana of 1947, the acknowledgment of any instrument without this state in compliance with the manner and form prescribed by the laws of the place of its execution, if in a state, a territory or insular possession of the United States, or in the District of Columbia, verified by the official seal of the officer before whom it is acknowledged, shall have the same effect as an acknowledgment in the manner and form prescribed by the laws of this state for instruments executed within the state.

History: En. Sec. 1, Ch. 81, L. 1953.

39-104. (6908) By whom taken without the United States. The proof or acknowledgment of an instrument may be made without the United States, before either:

1. A minister, commissioner, or charge d'affaires of the United States, resident and accredited in the country where the proof or acknowledgment is made; or,

2. A consul, vice-consul, or consular agent of the United States, resident in the country where the proof or acknowledgment is made; or,

3. A judge of a court of record of the country where the proof or acknowledgment is made; or,

4. Commissioners appointed for such purposes by the governor of the state, pursuant to special statutes; or,

5. A notary public.

History: En. Sec. 1603, Civ. C. 1895; re-en. Sec. 4657, Rev. C. 1907; re-en. Sec. 6908, R. C. M. 1921. Cal. Civ. C. Sec. 1183.

compliance with section 91-3802. In re Astibia's Estate, 100 M 224, 233, 46 P 2d 712.

Power of Attorney in Heirship Matter

Power of attorney filed for proof of authority of counsel in heirship matter, was duly acknowledged, and notary's authority duly certified by U. S. consul. Sufficient

Collateral References

Acknowledgment ⇨ 18.

1 C.J.S. Acknowledgments § 50.

1 Am. Jur. 342, Acknowledgments, § 68.

39-105. (6909) Deputy can take acknowledgment. When any of the officers mentioned in the four preceding sections are authorized by law to appoint a deputy, the acknowledgment or proof may be taken by such deputy, in the name of his principal.

History: En. Sec. 1604, Civ. C. 1895; re-en. Sec. 4658, Rev. C. 1907; re-en. Sec. 6909, R. C. M. 1921. Cal. Civ. C. Sec. 1184.

39-106. Acknowledgments and other notarial acts may be done by designated officers in armed services. (1) In addition to the acknowledgment of instruments and the performance of other notarial acts in the manner and form and as otherwise authorized by law, instruments may be acknowledged, documents attested, oaths and affirmations administered, depositions and affidavits executed, and other notarial acts performed, before or by any commissioned officer in active service of the armed forces of the United States with the rank of second lieutenant or higher in the army or marine corps, or with the rank of ensign or higher in the navy

or coast guard, or with equivalent rank in any other component part of the armed forces of the United States, by any person who either (a) is a member of the armed forces of the United States, or (b) is serving as a merchant seaman outside the limits of the United States included within the forty-eight (48) states and the District of Columbia; or (c) is outside the limits of the United States of America by permission, assignment or direction of any department or official of the United States government, in connection with any activity pertaining to the prosecution of any war in which the United States is then engaged.

(2) Such acknowledgment of instruments, attestation of documents, administration of oaths and affirmations, execution of depositions and affidavits, and performance of other notarial acts, heretofore or hereafter made or taken, are hereby declared legal, valid and binding, and instruments and documents so acknowledged, authenticated, or sworn to shall be admissible in evidence and eligible to record in this state under the same circumstances, and with the same force and effect as if such acknowledgment, attestation, oath, affirmation, deposition, affidavit, or other notarial act, had been made or taken within this state before or by a duly qualified officer or official as otherwise provided by law.

(3) In the taking of acknowledgments and the performing of other notarial acts requiring certification, a certificate endorsed upon or attached to the instrument or documents, which shows the date of the notarial act and which states, in substance, that the person appearing before the officer acknowledged the instrument as his act or made or signed the instrument or document under oath, shall be sufficient for all intents and purposes. The instrument or document shall not be rendered invalid by the failure to state the place of execution or acknowledgment.

(4) The signature, rank, and branch of service or subdivision thereof, of any such commissioned officer shall appear upon such instrument or document or certificate and no further proof of the authority of such officer so to act shall be required and such action by such commissioned officer shall be prima facie evidence that the person making such oath or acknowledgment is within the purview of this act.

History: En. Sec. 1, Ch. 117, L. 1945.

39-107. (6910) Officer taking acknowledgment must know person—corporations. The acknowledgment of an instrument must not be taken unless the officer taking it knows or has satisfactory evidence, on the oath or affirmation of a credible witness, that the person making such acknowledgment is the individual who is described in and who executed the instrument; or, if executed by a corporation, that the person making such acknowledgment is the president, or vice-president, or secretary, or assistant secretary of such corporation, or other person duly authorized by resolution of such corporation, who executed it on its behalf.

History: En. Sec. 1605, Civ. C. 1895; re-en. Sec. 4659, Rev. C. 1907; amd. Sec. 1, Ch. 2, L. 1913; re-en. Sec. 6910, R. C. M. 1921; amd. Sec. 1, Ch. 171, L. 1937. Cal. Civ. C. Sec. 1185.

Corporate Vice-President

While a vice-president is not specifically designated by statute in this state as one who has authority to acknowledge an instrument on behalf of his corporation, in

view of the provisions of this section and sections 39-112 and 39-129, in each of which an acknowledgment by such officer is recognized, the legislature intended to give effect to instruments so acknowledged. *Gotzian & Co. v. Norris et al.*, 89 M 307, 316, 297 P 489.

References

Genzberger v. Adams, 62 M 430, 435, 205 P 658; *Steinbrenner v. Elder*, 80 M 395, 399, 260 P 725.

Collateral References

Acknowledgment⌘22.
1 C.J.S. Acknowledgments §§ 69, 77.

39-108. (6911) Acknowledgment by married women. The acknowledgment of a married woman to an instrument purporting to be executed by her must be taken the same as that of any other person.

History: En. Sec. 1606, Civ. C. 1895; re-en. Sec. 4660, Rev. C. 1907; re-en. Sec. 6911, R. C. M. 1921. Cal. Civ. C. Sec. 1186.

Collateral References

Acknowledgment⌘25.
1 C.J.S. Acknowledgments § 76.

39-109. (6912) Conveyance by married woman—acknowledgment. A conveyance by a married woman has the same effect as if she were unmarried, and may be acknowledged in the same manner.

History: En. Sec. 1607, Civ. C. 1895; re-en. Sec. 4661, Rev. C. 1907; re-en. Sec. 6912, R. C. M. 1921. Cal. Civ. C. Sec. 1187. Based on Field Civ. C. Sec. 522.

Collateral References

Acknowledgment⌘25; Husband and Wife⌘69.
1 C.J.S. Acknowledgments § 76; 41 C.J.S. Husband and Wife § 196.

39-110. (6913) Officer must endorse certificate. An officer taking the acknowledgment of an instrument must endorse thereon, or attach thereto, a certificate substantially in the forms hereinafter prescribed.

History: En. Sec. 1608, Civ. C. 1895; re-en. Sec. 4662, Rev. C. 1907; re-en. Sec. 6913, R. C. M. 1921. Cal. Civ. C. Sec. 1188.

Collateral References

Acknowledgment⌘29.
1 C.J.S. Acknowledgments § 83.

39-111. (6914) General form of certificate. The certificate of acknowledgment, unless it is otherwise in this chapter provided, must be substantially in the following form:

State of }
County of } ss.

On this day of, in the year, before me (here insert the name and quality of the officer), personally appeared, known to me (or proved to me on the oath of), to be the person whose name is subscribed to the within instrument, and acknowledged to me that he (she or they) executed the same.

History: En. Sec. 1609, Civ. C. 1895; re-en. Sec. 4663, Rev. C. 1907; re-en. Sec. 6914, R. C. M. 1921. Cal. Civ. C. Sec. 1189.

Collateral References

Acknowledgment⌘36(1).
1 C.J.S. Acknowledgments § 91.

References

Springhorn v. Springer et al., 75 M 294, 301, 243 P 803.

Sufficiency of certificate of acknowledgment. 25 ALR 2d 1124.

39-112. (6915) Certificate of acknowledgment by corporation. The certificate of acknowledgment of an instrument executed by a corporation must be substantially in the following form:

State of }
County of } ss.

On this day of, in the year, before me (here insert the name and quality of the officer), personally appeared, known to me (or proved to me on the oath of) to be the president (or vice-president) or the secretary (or the assistant secretary) of the corporation that executed the within instrument (where, however, the instrument is executed in behalf of the corporation by some one other than the president, or vice-president, or secretary, or assistant secretary), insert: known to me (or proved to me on the oath of) to be the person who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

History: En. Sec. 1612, Civ. C. 1895; re-en. Sec. 4664, Rev. C. 1907; amd. Sec. 1, Ch. 3, L. 1913; re-en. Sec. 6915, R. C. M. 1921; amd. Sec. 1, Ch. 169, L. 1937. Cal. Civ. C. Sec. 1190.

Vice-President

While a vice-president is not specifically designated by statute in this state as one who has authority to acknowledge an instrument on behalf of his corporation, in view of the provisions of sections 39-107,

this section and 39-129, in each of which an acknowledgment by such officer is recognized, the legislature intended to give effect to instruments so acknowledged. Gotzian & Co. v. Norris et al., 89 M 307, 316, 297 P 489.

References

Genzberger v. Adams, 62 M 430, 435, 205 P 658; Stauffacher v. Great Falls P. S. Co. et al., 99 M 324, 43 P 2d 647.

39-113. (6916) Form of certificate of acknowledgment by married woman. The certificate of acknowledgment by a married woman must be substantially in the form prescribed in section 39-111.

History: En. Sec. 1611, Civ. C. 1895; re-en. Sec. 4665, Rev. C. 1907; re-en. Sec. 6916, R. C. M. 1921. Cal. Civ. C. Sec. 1191.

Collateral References

Acknowledgment § 37.
1 C.J.S. Acknowledgments § 100.

39-114. (6917) Form of certificate of acknowledgment by attorney in fact. The certificate of acknowledgment by an attorney in fact must be substantially in the following form:

State of }
County of } ss.

On this day of, in the year, before me (here insert the name and quality of the officer), personally appeared, known to me (or proved to me on the oath of), to be the person whose name is subscribed to the within instrument as the attorney in fact of, and acknowledged to me that he subscribed the name of thereto as principal, and his own name as attorney in fact.

History: En. Sec. 1612, Civ. C. 1895; re-en. Sec. 4666, Rev. C. 1907; re-en. Sec. 6917, R. C. M. 1921. Cal. Civ. C. Sec. 1192.

39-115. (6918) Officers must affix their signatures. Officers taking and certifying acknowledgments or proof of instruments for record must authenticate their certificates by affixing their signatures, followed by the

names of their offices; also, their seals of office, if by the laws of the state or country where the acknowledgment or proof is taken, or by authority of which they are acting, they are required to have official seals.

History: En. Sec. 1613, Civ. C. 1895; re-en. Sec. 4667, Rev. C. 1907; re-en. Sec. 6918, R. C. M. 1921. Cal. Civ. C. Sec. 1193.

Collateral References

Acknowledgment⌘33.

1 C.J.S. Acknowledgments §§ 88, 89.

Liability of notary public taking acknowledgment. 17 ALR 2d 948.

39-116. (6919) Certificate of authority of justices in certain cases.

The certificate of proof or acknowledgment, if made before a justice of the peace, when used in any county other than that in which he resides, must be accompanied by a certificate, under the hand and seal of the clerk of the county in which the justice resides, setting forth that such justice, at the time of making such proof or acknowledgment, was authorized to take the same, and that the clerk is acquainted with his handwriting, and believes that the signature to the original certificate is genuine.

History: En. Sec. 1614, Civ. C. 1895; re-en. Sec. 4668, Rev. C. 1907; re-en. Sec. 6919, R. C. M. 1921. Cal. Civ. C. Sec. 1194.

Collateral References

Acknowledgment⌘32.

1 C.J.S. Acknowledgments § 87.

39-117. (6920) Proof of execution—how made. Proof of the execution of an instrument, when not acknowledged, may be made either:

1. By the party executing it, or either of them; or,
2. By a subscribing witness; or,
3. By other witnesses, in cases mentioned in section 39-120.

History: En. Sec. 1615, Civ. C. 1895; re-en. Sec. 4669, Rev. C. 1907; re-en. Sec. 6920, R. C. M. 1921. Cal. Civ. C. Sec. 1195.

Collateral References

Acknowledgment⌘12; Evidence⌘601 (2).

1 C.J.S. Acknowledgments § 40; 32 C. J.S. Evidence § 1050.

39-118. (6921) Witness must be personally known to officer. If by a subscribing witness, such witness must be personally known to the officer taking the proof to be the person whose name is subscribed to the instrument as a witness, or must be proved to be such by the oath of a credible witness.

History: En. Sec. 1616, Civ. C. 1895; re-en. Sec. 4670, Rev. C. 1907; re-en. Sec. 6921, R. C. M. 1921. Cal. Civ. C. Sec. 1196.

39-119. (6922) What must be proved by subscribing witness. The subscribing witness must prove that the person whose name is subscribed to the instrument as a party is the person described in it, and that such person executed it, and that the witness subscribed his name thereto as a witness.

History: En. Sec. 1617, Civ. C. 1895; re-en. Sec. 4671, Rev. C. 1907; re-en. Sec. 6922, R. C. M. 1921. Cal. Civ. C. Sec. 1197.

Collateral References

Acknowledgment⌘27; Evidence⌘601 (2).

1 C.J.S. Acknowledgments § 74; 32 C. J.S. Evidence § 1050.

39-120. (6923) Handwriting may be proved, when. The execution of an instrument may be established by proof of the handwriting of the party and of a subscribing witness, if there is one, in the following cases:

1. When the parties and all the subscribing witnesses are dead; or,
2. When the parties and all the subscribing witness are nonresidents of the state; or,
3. When the place of their residence is unknown to the party desiring the proof, and cannot be ascertained by the exercise of due diligence; or,
4. When the subscribing witness conceals himself, or cannot be found by the officer by the exercise of due diligence in attempting to serve the subpoena or attachment; or,
5. In case of the continued failure or refusal of the witness to testify for the space of one hour, after his appearance.

History: En. Sec. 1618, Civ. C. 1895;
re-en. Sec. 4672, Rev. C. 1907; re-en. Sec.
6923, R. C. M. 1921. Cal. Civ. C. Sec. 1198.

Collateral References

Evidence ⇨ 562, 601(2).
32 C.J.S. Evidence §§ 516, 531, 614, 616,
1050.

39-121. (6924) What facts must be proved by evidence of handwriting. The evidence taken under the preceding section must satisfactorily prove to the officer the following facts:

1. The existence of one or more of the conditions mentioned therein; and,
2. That the witness testifying knew the person whose name purports to be subscribed to the instrument as a party, and is well acquainted with his signature, and that it is genuine; and,
3. That the witness testifying personally knew the person who subscribed the instrument as a witness, and is well acquainted with his signature, and that it is genuine; and,
4. The place of residence of the witness.

History: En. Sec. 1619, Civ. C. 1895;
re-en. Sec. 4673, Rev. C. 1907; re-en. Sec.

6924, R. C. M. 1921. Cal. Civ. C. Sec. 1199.

39-122. (6925) Certificate of proof. An officer taking proof of the execution of any instrument must, in his certificate endorsed thereon or attached thereto, set forth all the matters required by law to be done or known by him, or proved before him on the proceeding, together with the names of all the witnesses examined before him, their places of residence respectively, and the substance of their testimony.

History: En. Sec. 1620, Civ. C. 1895;
re-en. Sec. 4674, Rev. C. 1907; re-en. Sec.
6925, R. C. M. 1921. Cal. Civ. C. Sec. 1200.
Based on Field Civ. C. Sec. 526.

Collateral References

Acknowledgment ⇨ 29-38.
1 C.J.S. Acknowledgments §§ 83-114.

39-123. (6926) Officers authorized to do certain things. Officers authorized to take the proof of instruments are authorized in such proceedings:

1. To administer oaths or affirmations, as prescribed in the Code of Civil Procedure;
2. To employ and swear interpreters;

3. To issue subpoenas, as prescribed in the Code of Civil Procedure;
4. To punish for contempt, as prescribed in the Code of Civil Procedure.

The civil damages and forfeiture to the party aggrieved are prescribed in the Code of Civil Procedure.

History: En. Sec. 1621, Civ. C. 1895; re-en. Sec. 4675, Rev. C. 1907; re-en. Sec. 6926, R. C. M. 1921. Cal. Civ. C. Sec. 1201.

tion relating to probate and guardianship which is Title 91.

Collateral References

Acknowledgment²⁴.
1 C.J.S. Acknowledgments § 68.

39-124. (6927) Instrument improperly certified—how corrected. When the acknowledgment or proof of the execution of an instrument is properly made, but defectively certified, any party interested may have an action in the district court to obtain a judgment correcting the certificate.

History: En. Sec. 1622, Civ. C. 1895; re-en. Sec. 4676, Rev. C. 1907; re-en. Sec. 6927, R. C. M. 1921. Cal. Civ. C. Sec. 1202.

Collateral References

Acknowledgment⁴⁶.
1 C.J.S. Acknowledgments § 119.

39-125. (6928) Judgment proving instrument. Any person interested under an instrument entitled to be proved for record may institute an action in the district court against the proper parties to obtain a judgment proving such instrument.

History: En. Sec. 1623, Civ. C. 1895; re-en. Sec. 4677, Rev. C. 1907; re-en. Sec. 6928, R. C. M. 1921. Cal. Civ. C. Sec. 1203.

39-126. (6929) Effect of judgment in such action. A certified copy of the judgment in a proceeding instituted under either of the two preceding sections, showing the proof of the instrument, and attached thereto, entitles such instrument to record, with the like effect as if acknowledged.

History: En. Sec. 1624, Civ. C. 1895; re-en. Sec. 4678, Rev. C. 1907; re-en. Sec. 6929, R. C. M. 1921. Cal. Civ. C. Sec. 1204.

39-127. (6930) Conveyances heretofore made to be governed by then existing laws. The legality of the execution, acknowledgment, proof, form, or record of any conveyance or other instrument made before this code goes into effect, executed, acknowledged, proved, or recorded, is not affected by anything contained in this chapter, but depends for its validity and legality upon the laws in force when the act was performed.

History: En. Sec. 41, p. 403, Cod. Stat. 1871; re-en. Sec. 218, 5th Div. Rev. Stat. 1879; re-en. Sec. 276, 5th Div. Comp. Stat. 1887; amd. Sec. 1625, Civ. C. 1895; re-en. Sec. 4679, Rev. C. 1907; re-en. Sec. 6930, R. C. M. 1921. Cal. Civ. C. Sec. 1205.

References

Cited or applied as section 4679, Civil Code, in *Westheimer v. Goodkind*, 24 M 90, 100, 60 P 813.

Collateral References

Acknowledgment³, 47.
1 C.J.S. Acknowledgments §§ 5, 120.

39-128. (6931) Effect as evidence of instruments made and acknowledged before code takes effect—recording. All conveyances of real property made before this code goes into effect, and acknowledged or proved according to the laws in force at the time of such making and acknowledged-

ment or proof, have the same force as evidence, and may be recorded in the same manner and with the like effect, as conveyances executed and acknowledged in pursuance of this chapter.

History: En. Sec. 1626, Civ. C. 1895; 6931, R. C. M. 1921. Cal. Civ. C. Sec. 1206. re-en. Sec. 4680, Rev. C. 1907; re-en. Sec.

39-129. (6932) Validation of records erroneously executed or acknowledged—copies as evidence. Any instrument affecting real property, which was, previous to the date this act takes effect, copied into the proper book, kept in the office of the county clerk and recorder, shall be deemed to impart, after that date, notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, or informality in the execution of the instrument or in the certificate of acknowledgment thereof, or the absence of any such certificate; and all such instruments heretofore acknowledged by the vice-president and assistant secretary of any corporation, or by either of them, or other person duly authorized by resolution by such corporation executing the same on behalf of the corporation, and recorded, shall be valid and shall have the same force and effect as though acknowledged by the president or secretary; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to the date this act takes effect. Duly certified copies of the record of any such instrument may be read in evidence, with like effect as copies of an instrument duly acknowledged and recorded.

History: En. Sec. 1627, Civ. C. 1895; re-en. Sec. 4681, Rev. C. 1907; amd. Sec. 1, Ch. 4, L. 1913; re-en. Sec. 6932, R. C. M. 1921; amd. Sec. 1, Ch. 17, L. 1931; amd. Sec. 1, Ch. 4, L. 1943. Cal. Civ. C. Sec. 1207.

NOTE.—An identical validating act was passed as Ch. 36, Laws 1947 (sec. 39-133).

Improper Acknowledgment

Under this section, an instrument affecting real property recorded prior to the enactment of the section is to be deemed to impart notice to subsequent purchasers and encumbrancers though improperly acknowledged, and is admissible in evidence. *First State Bank v. Mussigbrod et al.*, 83 M 68, 95, 271 P 695.

Vice-President

While a vice-president is not specifically designated by statute in this state as one who has authority to acknowledge an instrument on behalf of his corporation, it must be held that in view of the provisions of sections 39-107 and 39-112, and this section, in each of which an acknowledgment by such officer is recognized, the legislature intended to give effect to instruments so acknowledged. *Gotzian & Co. v. Norris et al.*, 89 M 307, 317, 297 P 489.

Collateral References

Acknowledgment↔47; Evidence↔343.
1 C.J.S. Acknowledgments § 120; 32 C.J.S. Evidence § 659.

39-130. (6933) Deeds heretofore executed valid though not acknowledged. All deeds to real property heretofore executed in this state, or any state or territory of the United States, which shall have been signed by the grantors in due form, shall be sufficient in law to convey the legal title to the premises therein described from the grantors to the grantees, without any other execution or acknowledgment or witnesses thereto whatever; and such deeds so executed shall be received in evidence in all courts in this state, and be conclusive evidence of the title to the lands therein described against the grantors, their heirs and assigns.

History: En. Sec. 1, p. 145, L. 1899; 6933, R. C. M. 1921; amd. Sec. 2, Ch. 4, re-en. Sec. 4682, Rev. C. 1907; re-en. Sec. L. 1943.

39-131. Deeds made prior to 1900—presumption grantor had no wife living. When a deed to real property has been made, executed and acknowledged prior to the year 1900 by a grantor without recital in the body of the deed or acknowledgment as to whether or not the grantor is married or single, and the wife of such grantor, if any, not joining in the conveyance, or otherwise releasing or conveying her dower, the presumption shall be that the person conveying such land had no wife living at the date of such conveyance and that such land was conveyed free of all right of dower, inchoate or vested.

History: En. Sec. 1, Ch. 183, L. 1945.

Finding that Grantor Was Single

Where instrument, executed in 1876, purporting to sell interest in land did not

show marital status of grantor, it was proper for district court to find that he was a single man. *Clinton v. Miller*, 124 M 463, 226 P 2d 487, 497.

39-132. (6933.1) Validation of instruments omitting address of grantee, mortgagee or assignee—copies as evidence. Any deed, mortgage, or assignment of mortgage which was, previous to the date this act takes effect, copied into the proper book, kept in the office of the county clerk and recorder, shall be deemed to impart, after the date this act takes effect, notice of its contents to subsequent purchasers and encumbrancers notwithstanding the omission therefrom of the post-office address of the grantee, mortgagee, or assignee of the mortgagee, as the case may be; and all such instruments heretofore recorded which do not contain the post-office address of the grantee, mortgagee, or assignee of the mortgagee, as the case may be, shall be valid and shall have the same force and effect as though the post-office address of such grantee, mortgagee, or assignee of the mortgagee were contained therein; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to the date this act takes effect. Duly certified copies of the record of any such instrument may be read in evidence, with like effect as certified copies of instruments duly recorded containing the post-office address of the grantee, mortgagee, or assignee of the mortgagee, as the case may be.

History: En. Sec. 1, Ch. 37, L. 1931.

26 C.J.S. Deeds § 38; 59 C.J.S. Mortgages §§ 114, 346.

Collateral References

Deeds⌚52; Mortgages⌚55, 224.

39-133. Validation of recorded instruments affecting real property regardless of defects in execution. Any instrument affecting real property, which was, previous to the date this act takes effect, copied into the proper book, kept in the office of the county clerk and recorder, shall be deemed to impart, after that date, notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, or informality in the execution of the instrument or in the certificate of acknowledgment thereof, or the absence of any such certificate; and all such instruments heretofore acknowledged by the vice-president and assistant secretary of any corporation, or by either of them, or other person duly authorized by resolution by such corporation executing the same on behalf of the corporation, and recorded, shall be valid and shall have the same force and effect as though acknowledged by the president or secretary; but nothing herein

shall be deemed to affect the rights of purchasers or encumbrancers previous to that date. Duly certified copies of the record of any such instrument may be read in evidence, with like effect as copies of an instrument duly acknowledged and recorded.

History: En. Sec. 1, Ch. 36, L. 1947.

Collateral References

NOTE.—Previous validating acts of this nature are section 39-129 and earlier versions of that section.

Record of instruments without sufficient acknowledgment as notice. 59 ALR 2d 1299.

39-134. Validation of deeds not formally executed. All deeds to real property heretofore executed in this state, or any state or territory of the United States, which shall have been signed by the grantors in due form, shall be sufficient in law to convey the legal title to the premises therein described from the grantors to the grantees, without any other execution or acknowledgment or witnesses thereto whatever; and such deeds so executed shall be received in evidence in all courts in this state, and be conclusive evidence of the title to the lands therein described against the grantors, their heirs and assigns.

History: En. Sec. 1, Ch. 37, L. 1947.

TITLE 40

INSURANCE AND INSURANCE COMPANIES

- Chapter 1. Insurance in general—definitions—what may be insured, Repealed—Section 673, Chapter 286, Laws of 1959.
2. Parties—insurable interest, Repealed—Section 673, Chapter 286, Laws of 1959.
3. Concealment and representation, Repealed—Section 673, Chapter 286, Laws of 1959.
4. The policy, Repealed—Section 673, Chapter 286, Laws of 1959.
5. Warranties—the premium, Repealed—Section 673, Chapter 286, Laws of 1959.
6. Loss and notice of loss, Repealed—Section 673, Chapter 286, Laws of 1959.
7. Double insurance—reinsurance, Repealed—Section 673, Chapter 286, Laws of 1959.
8. Marine insurance, Repealed—Section 673, Chapter 286, Laws of 1959.
9. Fire insurance risks—alteration, Repealed—Section 673, Chapter 286, Laws of 1959.
10. Life, health and accident insurance, Repealed—Section 673, Chapter 286, Laws of 1959.
11. Insurance and surety companies' regulation by commissioner of insurance, Repealed—Section 673, Chapter 286, Laws of 1959.
12. State insurance commission, Repealed—Section 1, Chapter 163, Laws of 1959; Section 673, Chapter 286, Laws of 1959.
13. Insurance companies—license and general regulations, 40-1301 to 40-1333, Repealed—Section 673, Chapter 286, Laws of 1959; 40-1334 to 40-1336, Superseded.
14. Insurance companies other than life, Repealed—Chapter 66, Laws of 1947; Section 4, Chapter 43, Laws of 1959; Section 673, Chapter 286, Laws of 1959.
15. Mutual hail, fire and other casualty insurance of farm property and stock and rural buildings, Repealed—Section 673, Chapter 286, Laws of 1959.
16. Mutual rural insurance companies, Repealed—Section 673, Chapter 286, Laws of 1959.
17. Surety companies (40-1701, 40-1702, 40-1704 to 40-1722, 40-1726, Repealed—Section 673, Chapter 286, Laws of 1959), 40-1703, 40-1723 to 40-1725, 40-1727.
18. Assessment accident insurance companies, Repealed—Section 673, Chapter 286, Laws of 1959.
19. Life insurance companies, Repealed—Chapter 241, Laws of 1947; Section 673, Chapter 286, Laws of 1959.
20. Assessment life insurance companies, Repealed—Section 673, Chapter 286, Laws of 1959.
21. Fraternal benefit societies, Repealed—Section 673, Chapter 286, Laws of 1959.
22. Benevolent associations—regulation by insurance commissioner, Repealed—Section 673, Chapter 286, Laws of 1959.
23. Title insurance companies, Repealed—Section 673, Chapter 286, Laws of 1959.
24. Insurance rate regulation—rating bureaus, Repealed—Section 673, Chapter 286, Laws of 1959.
25. Surplus line insurance, Repealed—Section 673, Chapter 286, Laws of 1959.
26. Scope of code, 40-2601 to 40-2617.
27. The commissioner of insurance, 40-2701 to 40-2726.
28. Authorization of insurers and general requirements, 40-2801 to 40-2826.
29. Kinds of insurance—limits of risk—reinsurance, 40-2901 to 40-2910.
30. Assets and liabilities, 40-3001 to 40-3016.
31. Investments, 40-3101 to 40-3134.
32. Administration of deposits, 40-3201 to 40-3213.
33. Agents, solicitors and adjusters, 40-3301 to 40-3331.
34. Unauthorized insurers and surplus lines, 40-3401 to 40-3427.

35. Trade practices and frauds, 40-3501 to 40-3522.
36. Rates and rating organizations, 40-3601 to 40-3633.
37. The insurance contract, 40-3701 to 40-3737.
38. Life insurance and annuities, 40-3801 to 40-3833.
39. Group life insurance, 40-3901 to 40-3923.
40. Disability insurance policies, 40-4001 to 40-4034.
41. Group and blanket disability insurance, 40-4101 to 40-4107.
42. Credit life and disability insurance, 40-4201 to 40-4217.
43. Property insurance contracts, 40-4301, 40-4302.
44. Casualty insurance contracts, 40-4401.
45. Surety insurance contracts, 40-4501 to 40-4503.
46. Title insurance, 40-4601 to 40-4603.
47. Organization and corporate procedures of stock and mutual insurers, 40-4701 to 40-4750.
48. Farm mutual insurers, 40-4801 to 40-4853.
49. Benevolent associations, 40-4901 to 40-4917.
50. Reciprocal insurers, 40-5001 to 40-5028.
51. Rehabilitation and liquidation, 40-5101 to 40-5133.
52. Truited assets of alien insurers, 40-5201 to 40-5215.
53. Fraternal benefit societies, 40-5301 to 40-5359.

CHAPTER 1

INSURANCE IN GENERAL—DEFINITIONS—WHAT MAY BE INSURED

(Repealed—Section 673, Chapter 286, Laws of 1959)

40-101 to 40-105. Repealed.

Repeal These sections (Secs. 3370, 3380 to 3383, Civ. C. 1895), relating to insurance in	general, were repealed by Sec. 673, Ch. 286, Laws 1959.
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CHAPTER 2

PARTIES—INSURABLE INTEREST

(Repealed—Section 673, Chapter 286, Laws of 1959)

40-201 to 40-218. Repealed.

Repeal These sections (Secs. 3390 to 3394, 3400 to 3412, Civ. C. 1895), relating to parties	and insurable interest, were repealed by Sec. 673, Ch. 286, Laws 1959.
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CHAPTER 3

CONCEALMENT AND REPRESENTATION

(Repealed—Section 673, Chapter 286, Laws of 1959)

40-301 to 40-323. Repealed.

Repeal These sections (Secs. 3420 to 3440, Civ. C. 1895, Sec. 1, Ch. 30, L. 1907, Sec. 3441,	Civ. C. 1895), relating to concealment and representation, were repealed by Sec. 673, Ch. 286, Laws 1959.
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CHAPTER 4

THE POLICY

(Repealed—Section 673, Chapter 286, Laws of 1959)

40-401 to 40-415. Repealed.

Repeal These sections (Secs. 3450, 3451, Civ. C. 1895, Sec. 1, Ch. 39, L. 1907, Secs. 3452 to	3463, Civ. C. 1895), relating to the policy, were repealed by Sec. 673, Ch. 286, Laws 1959.
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CHAPTER 5

WARRANTIES—THE PREMIUM

(Repealed—Section 673, Chapter 286, Laws of 1959)

40-501 to 40-517. Repealed.**Repeal**

These sections (Secs. 3470 to 3479, 3490 to 3496, Civ. C. 1895), relating to warran-

ties and the premium, were repealed by Sec. 673, Ch. 286, Laws 1959.

CHAPTER 6

LOSS AND NOTICE OF LOSS

(Repealed—Section 673, Chapter 286, Laws of 1959)

40-601 to 40-609. Repealed.**Repeal**

These sections (Secs. 3500 to 3503, 3510 to 3514, Civ. C. 1895), relating to loss and

notice of loss, were repealed by Sec. 673, Ch. 286, Laws 1959.

CHAPTER 7

DOUBLE INSURANCE—REINSURANCE

(Repealed—Section 673, Chapter 286, Laws of 1959)

40-701 to 40-706. Repealed.**Repeal**

These sections (Secs. 3520, 3521, 3530 to 3533, Civ. C. 1895), relating to double in-

surance and reinsurance, were repealed by Sec. 673, Ch. 286, Laws 1959.

CHAPTER 8

MARINE INSURANCE

(Repealed—Section 673, Chapter 286, Laws of 1959)

40-801. Repealed.**Repeal**

This section (Sec. 3540, Civ. C. 1895),

relating to marine insurance, was repealed by Sec. 673, Ch. 286, Laws 1959.

CHAPTER 9

FIRE INSURANCE RISKS—ALTERATION

(Repealed—Section 673, Chapter 286, Laws of 1959)

40-901 to 40-905. Repealed.**Repeal**

These sections (Secs. 3550 to 3553, Civ. C. 1895; Sec. 1, Ch. 23, L. 1935), relating

to fire insurance risks and alteration, were repealed by Sec. 673, Ch. 286, Laws 1959.

CHAPTER 10

LIFE, HEALTH AND ACCIDENT INSURANCE

(Repealed—Section 673, Chapter 286, Laws of 1959)

40-1001 to 40-1005. Repealed.**Repeal**

These sections (Secs. 3560 to 3564, Civ. C. 1895), relating to life, health and acci-

dent insurance, were repealed by Sec. 673, Ch. 286, Laws 1959.

CHAPTER 11**INSURANCE AND SURETY COMPANIES' REGULATION BY COMMISSIONER OF INSURANCE**

(Repealed—Section 673, Chapter 286, Laws of 1959)

40-1101 to 40-1118. Repealed.**Repeal**

These sections (Secs. 1, 3, Ch. 12, L. 1909; Secs. 1 to 3, Ch. 13, L. 1909; Sec. 1, Ch. 130, L. 1913; Sec. 1, Ch. 93, L. 1919; Sec. 1, Ch. 182, L. 1921; Secs. 1 to 4, Ch. 208, L. 1921; Sec. 1, Ch. 99, L. 1923; Sec. 4, Ch. 151, L. 1927; Sec. 1, Ch. 153, L.

1927; Sec. 1, Ch. 83, L. 1931; Secs. 1 to 5, Ch. 165, L. 1939; Sec. 3, Ch. 182, L. 1949), relating to insurance and surety companies' regulation by commissioner of insurance, were repealed by Sec. 673, Ch. 286, Laws 1959.

CHAPTER 12**STATE INSURANCE COMMISSION**

(Repealed—Section 1, Chapter 163, Laws of 1959; Section 673, Chapter 286, Laws of 1959)

40-1201 to 40-1204. Repealed.**Repeal**

These sections (Secs. 1 to 3, Ch. 103, L. 1939; Sec. 1, Ch. 74, L. 1955; Sec. 1, Ch. 179, L. 1955), relating to state insurance

commission, were repealed by Sec. 1, Ch. 163, Laws 1959; Sec. 673, Ch. 286, Laws 1959.

CHAPTER 13**INSURANCE COMPANIES—LICENSE AND GENERAL REGULATIONS**

Section 40-1301 to 40-1333. Repealed.

40-1334 to 40-1336. Superseded.

40-1301 to 40-1333. Repealed.**Repeal**

These sections (Secs. 1 to 3, 5 to 9, pp. 76 to 78, L. 1897; Sec. 8, Ch. 97, L. 1903; Secs. 1 to 5, Ch. 112, L. 1903; Sec. 1, Ch. 68, L. 1907; Sec. 2, Ch. 14, L. 1909; Sec. 1, Ch. 12, L. 1911; Sec. 1, Ch. 24, L. 1913; Secs. 1, 2, Ch. 63, L. 1915; Sec. 1, Ch. 30, L. 1921; Sec. 1, Ch. 20, L. 1923; Sec. 1,

Ch. 48, L. 1933; Secs. 1 to 7, Ch. 62, L. 1941; Secs. 1 to 5, Ch. 76, L. 1941; Secs. 1 to 4, Ch. 214, L. 1943; Sec. 1, Ch. 224, L. 1957; Sec. 1, Ch. 42, L. 1959), relating to insurance companies and licensing, were repealed by Sec. 673, Ch. 286, Laws 1959.

40-1334 to 40-1336. Superseded.**Compiler's Note**

These sections (Secs. 1 to 3, Ch. 43, L. 1959), relating to retaliation against for-

eign insurers, are superseded by section 40-2826.

CHAPTER 14**INSURANCE COMPANIES OTHER THAN LIFE**

(Repealed—Chapter 66, Laws of 1947; Section 4, Chapter 43, Laws of 1959; Section 673, Chapter 286, Laws of 1959)

40-1401 to 40-1441. Repealed.**Repeal**

These sections (Secs. 650 to 668, 670 to 672, 674, 675, 678, 680, 682, 683, Civ. C. 1895; Secs. 1-39, pp. 67-84, L. 1883; Secs. 1 to 4, p. 79, L. 1897; Secs. 3 to 6, pp. 118 to 120, L. 1899; Sec. 1, Ch. 72, L. 1907; Sec. 1, Ch. 87, L. 1907; Sec. 1, Ch. 25, L. 1909; Sec. 1, Ch. 48, L. 1911; Secs. 1 to 3, Ch. 114, L. 1911; Sec. 1, Ch. 39, L. 1913; Sec. 1, Ch. 118, L. 1919; Sec. 1, Ch. 135, L. 1919; Sec. 1, Ch. 218, L. 1919; Sec. 1,

Ch. 220, L. 1919; Sec. 1, Ch. 31, L. 1921; Sec. 1, Ch. 28, L. 1931; Sec. 1, Ch. 65, L. 1947; Sec. 1, Ch. 145, L. 1953), relating to insurance companies other than life, were repealed by Sec. 673, Ch. 286, Laws 1959.

Section 40-1428 (Sec. 677, Civ. C. 1895) was previously repealed by Sec. 4, Ch. 43, Laws 1959.

Section 40-1437 was previously repealed by Chapter 66, Laws 1947.

CHAPTER 15**MUTUAL HAIL, FIRE AND OTHER CASUALTY INSURANCE OF FARM PROPERTY AND STOCK AND RURAL BUILDINGS**

(Repealed—Section 673, Chapter 286, Laws of 1959)

40-1501 to 40-1517. Repealed.**Repeal**

These sections (Secs. 1 to 14, Ch. 58, L. 1905; Sec. 1, Ch. 180, L. 1907; Sec. 1, Ch. 120, L. 1917; Sec. 1, Ch. 32, L. 1921; Secs. 1 to 6, Ch. 73, L. 1931; Secs. 1, 2, Ch. 129, L. 1935; Sec. 1, Ch. 163, L. 1943;

Sec. 1, Ch. 107, L. 1945; Sec. 1, Ch. 98, L. 1949), relating to mutual hail, fire and other casualty insurance of farm property, were repealed by Sec. 673, Ch. 286, Laws 1959.

CHAPTER 16**MUTUAL RURAL INSURANCE COMPANIES**

(Repealed—Section 673, Chapter 286, Laws of 1959)

40-1601 to 40-1625. Repealed.**Repeal**

These sections (Secs. 1 to 21, Ch. 21, L. 1907; Secs. 1, 2, Ch. 104, L. 1911; Secs. 1, 2, Ch. 62, L. 1931; Secs. 1, 3, Ch. 96, L. 1933; Sec. 1, Ch. 95, L. 1939; Secs. 1, 2,

Ch. 121, L. 1939; Sec. 1, Ch. 247, L. 1947; Sec. 1, Ch. 97, L. 1949), relating to mutual rural insurance companies, were repealed by Sec. 673, Ch. 286, Laws 1959.

CHAPTER 17**SURETY COMPANIES**

Section 40-1701, 40-1702. Repealed.

40-1703. Deposit of money in bank for safekeeping by executors and other fiduciaries on agreement with surety.

40-1704 to 40-1722. Repealed.

40-1723. Estoppel to deny corporate power.

40-1724. Cost of surety bond to be allowed in account of officer.

40-1725. Surety companies not permitted to furnish bonds where indemnity required.

40-1726. Repealed.

40-1727. Bonds which may be furnished by public officers.

40-1701, 40-1702. Repealed.**Repeal**

These sections (Secs. 1, 2, Ch. 139, L. 1909), relating to foreign surety companies

and execution of official bonds, were repealed by Sec. 673, Ch. 286, Laws 1959.

40-1703. Deposit of money in bank for safekeeping by executors and other fiduciaries on agreement with surety. It shall be lawful for any

executor, administrator, guardian, receiver, trustee or other party of whom a bond, undertaking or other obligation is required, to agree with his surety or sureties for the deposit of any or all moneys and assets for which he and his surety or sureties are or may be held responsible, with a bank, savings bank, safe-deposit or trust company, authorized by law to do business as such, or with other depository approved by the court or a judge thereof, if such deposit is otherwise proper, for the safekeeping thereof, and in such manner as to prevent the withdrawal of such money or assets or any part thereof, without the written consent of such surety or sureties, or an order of court, or a judge thereof made on such notice to such surety or sureties as such court or judge may direct; provided, however, that such agreement shall not in any manner release from or change the liability of the principal or sureties as established by the terms of the said bond.

History: En. Sec. 1, Ch. 146, L. 1943.

40-1704 to 40-1722. Repealed.

Repeal

These sections (Secs. 3 to 21, Ch. 139, L. 1909; Sec. 1, Ch. 56, L. 1943), relating

to surety companies, were repealed by Sec. 673, Ch. 286, Laws 1959.

40-1723. (6227) Estoppel to deny corporate power. No company which has executed any bond as surety under the provisions of this act shall deny, in any proceedings for enforcing the liability which it assumed to incur, its corporate power to execute such instrument or assume such liability.

History: En. Sec. 22, Ch. 139, L. 1909;
re-en. Sec. 6227, R. C. M. 1921.

40-1724. (6228) Cost of surety bond to be allowed in account of officer. Any court or officer whose duty it is to pass upon the account of any person or corporation required by law to give a bond may, whenever such person or corporation has given any such surety company as surety upon such bond, allow in the settlement of such account a reasonable sum for the expense of procuring such surety.

History: En. Sec. 23, Ch. 139, L. 1909;
re-en. Sec. 6228, R. C. M. 1921.

Collateral References

Officers—91.
67 C.J.S. Officers § 102.

40-1725. (6234) Surety companies not permitted to furnish bonds where indemnity required. No foreign or other surety company shall hereafter be permitted to furnish the bond for any state, county, or city official, where such company requires, in addition to the payment of reasonable premiums, any indemnity or other security.

History: En. Sec. 1, Ch. 6, L. 1911;
re-en. Sec. 6234, R. C. M. 1921.

40-1726. Repealed.

Repeal

This section (Sec. 2, Ch. 6, L. 1911), re-

lating to penalty for violation of law, was repealed by Sec. 673, Ch. 286, Laws 1959.

40-1727. (6236) Bonds which may be furnished by public officers. Whenever an official bond is required of any state, county, city or township

officer, such officer may furnish either a surety company bond, or a good and sufficient individual bond, executed and approved as required by law or may furnish such other security as may be approved by the person, officer, or board authorized by law to examine and approve such official bond; provided, that where such officer shall furnish a surety company bond, the premium therefor shall be a proper charge against the general fund of the state, county, or city, as the case may be; provided, further, that the provisions of this section, making such premium a charge against the general fund of the state, county, city, town or township shall not be construed to include any deputy, clerk or subordinate officer, where a bond is required to be furnished by the principal or body appointing the same.

History: En. Sec. 3, Ch. 6, L. 1911;
re-en. Sec. 6236, R. C. M. 1921; amd. Sec.
1, Ch. 145, L. 1923; amd. Sec. 1, Ch. 45,
L. 1935.

Collateral References

Officers \Rightarrow 37.
67 C.J.S. Officers § 39.

CHAPTER 18

ASSESSMENT ACCIDENT INSURANCE COMPANIES

(Repealed—Section 673, Chapter 286, Laws of 1959)

40-1801 to 40-1820. Repealed.

Repeal

These sections (Secs. 1 to 20, pp. 93 to 103, L. 1893), relating to assessment acci-

dent insurance companies, were repealed by Sec. 673, Ch. 286, Laws 1959.

CHAPTER 19

LIFE INSURANCE COMPANIES

(Repealed—Chapter 241, Laws of 1947; Section 673, Chapter 286, Laws of 1959)

40-1901 to 40-1946. Repealed.

Repeal

These sections (Sec. 4, Ch. 73, L. 1907; Sec. 1, Ch. 74, L. 1907; Secs. 1 to 5, Ch. 79, L. 1907; Secs. 1 to 15, 18 to 22, Ch. 171, L. 1907; Secs. 1, 2, Ch. 15, L. 1909; Secs. 1, 2, Ch. 51, L. 1909; Sec. 1, Ch. 68, L. 1911; Sec. 1, Ch. 30, L. 1919; Sec. 1, Ch. 217, L. 1919; Sec. 1, Ch. 181, L. 1921; Sec. 1, Ch. 214, L. 1921; Secs. 1, 2, Ch. 8, L. 1923; Sec. 1, Ch. 59, L. 1925; Sec.

1, Ch. 67, L. 1925; Secs. 1 to 4, Ch. 38, L. 1933; Sec. 1, Ch. 173, L. 1939; Secs. 1 to 3, Ch. 105, L. 1945; Secs. 1 to 4, Ch. 197, L. 1951; Sec. 2, Ch. 145, L. 1953; Sec. 1, Ch. 198, L. 1953), relating to life insurance companies, were repealed by Sec. 673, Ch. 286, Laws 1959.

Sections 40-1927 to 40-1929 were previously repealed by Chapter 241, Laws 1947.

CHAPTER 20

ASSESSMENT LIFE INSURANCE COMPANIES

(Repealed—Section 673, Chapter 286, Laws of 1959)

40-2001 to 40-2012. Repealed.

Repeal

These sections (Secs. 1 to 16, pp. 41 to 48, L. 1885; Sec. 1, Ch. 136, L. 1919; Sec. 1, Ch. 215, L. 1919; Sec. 3, Ch. 145, L.

1953), relating to assessment life insurance companies, were repealed by Sec. 673, Ch. 286, Laws 1959.

CHAPTER 21

FRATERNAL BENEFIT SOCIETIES

(Repealed—Section 673, Chapter 286, Laws of 1959)

40-2101 to 40-2138. Repealed.**Repeal**

These sections (Secs. 1 to 31, Ch. 140, L. 1911; Secs. 1, 2, Ch. 164, L. 1917; Sec. 1, Ch. 214, L. 1919; Sec. 1, Ch. 84, L. 1929; Sec. 1, Ch. 29, L. 1931; Sec. 1, Ch. 31, L. 1931; Sec. 1, Ch. 61, L. 1931; Sec. 1, Ch.

191, L. 1931; Sec. 1, Ch. 130, L. 1941; Secs. 1 to 4, Ch. 97, L. 1945; Secs. 1 to 4, Ch. 14, L. 1953), relating to fraternal benefit societies, were repealed by Sec. 673, Ch. 286, Laws 1959.

CHAPTER 22

BENEVOLENT ASSOCIATIONS—REGULATION BY INSURANCE COMMISSIONER

(Repealed—Section 673, Chapter 286, Laws of 1959)

40-2201 to 40-2212. Repealed.**Repeal**

These sections (Secs. 1 to 12, Ch. 153, L. 1945; Secs. 1, 2, Ch. 156, L. 1947), relating

to benevolent associations, were repealed by Sec. 673, Ch. 286, Laws 1959.

CHAPTER 23

TITLE INSURANCE COMPANIES

(Repealed—Section 673, Chapter 286, Laws of 1959)

40-2301 to 40-2310. Repealed.**Repeal**

These sections (Secs. 1 to 10, Ch. 118, L. 1915), relating to title insurance compan-

ies, were repealed by Sec. 673, Ch. 286, Laws 1959.

CHAPTER 24

INSURANCE RATE REGULATION—RATING BUREAUS

(Repealed—Section 673, Chapter 286, Laws of 1959)

40-2401 to 40-2416. Repealed.**Repeal**

These sections (Secs. 1 to 16, Ch. 255, L. 1947; Sec. 1, Ch. 200, L. 1951; Sec. 1, Ch.

108, L. 1955), relating to insurance rate regulation and rating bureaus, were repealed by Sec. 673, Ch. 286, Laws 1959.

CHAPTER 25

SURPLUS LINE INSURANCE

(Repealed—Section 673, Chapter 286, Laws of 1959)

40-2501 to 40-2513. Repealed.**Repeal**

These sections (Secs. 1 to 13, Ch. 90, L. 1949), relating to surplus line insurance,

were repealed by Sec. 673, Ch. 286, Laws 1959.

CHAPTER 26

SCOPE OF CODE

- Section 40-2601. Short title.
 40-2602. "Insurance" defined.
 40-2603. "Insurer" defined.
 40-2604. "Person" defined.
 40-2605. "Commissioner," "department" defined.
 40-2606. "Domestic," "foreign," "alien" insurer and "state" defined.
 40-2607. "Authorized," "unauthorized" insurer defined.
 40-2608. "Transacting" insurance.
 40-2609. Compliance required.
 40-2610. Application of code as to particular types of insurers.
 40-2611. Exempted organizations, activities.
 40-2612. Existing certificates of authority and licenses.
 40-2613. Existing forms and filings.
 40-2614. Existing domestic insurers.
 40-2615. General saving clause.
 40-2616. Particular provisions prevail.
 40-2617. General penalty.

40-2601. Short title. This act constitutes the Montana Insurance Code.

History: En. Sec. 1, Ch. 286, L. 1959. used in this act, they refer to sections 40-2601 to 40-5359.

Compiler's Note

Wherever the words "this code" are

40-2602. "Insurance" defined. "Insurance" is a contract whereby one undertakes to indemnify another or pay or provide a specified or determinable amount or benefit upon determinable contingencies.

History: En Sec. 2, Ch. 286, L. 1959. 44 C.J.S. Insurance § 1.
 29 Am. Jur. 433, Insurance, §§ 3 et seq.

Collateral References

Insurance ◊ 2. What constitutes insurance. 63 ALR 711.

40-2603. "Insurer" defined. "Insurer" includes every person engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance.

History: En. Sec. 3, Ch. 286, L. 1959. 44 C.J.S. Insurance § 49.
 29 Am. Jur. 436, Insurance, § 5.

Collateral References

Insurance ◊ 32.

40-2604. "Person" defined. "Person" includes an individual, insurer, company, association, organization, Lloyds, society, reciprocal or interinsurance exchange, partnership, syndicate, business trust, corporation, and any other legal entity.

History: En. Sec. 4, Ch. 286, L. 1959.

DECISIONS UNDER FORMER LAW

Associations

Former section 40-1301, expressly authorizing (unincorporated) associations organized under the laws of the United States, or any of its states or territories, to engage in the insurance business in Montana, was a special statute and such

associations were, therefore, unaffected by the general one (93-6401), providing that a civil action may be brought in the name of the state against an association which acts as a corporation without being legally incorporated. State ex rel. v. Porter, 88 M 347, 349 et seq., 294 P 363.

40-2605. "Commissioner," "department" defined. Unless context requires otherwise:

(1) "Commissioner" means commissioner of insurance of the state of Montana.

(2) "Department" means the department of insurance of the state of Montana.

History: En. Sec. 5, Ch. 286, L. 1959.

Collateral References

Insurance \Rightarrow 10.

44 C.J.S. Insurance § 57.

40-2606. "Domestic," "foreign," "alien" insurer and "state" defined.

(1) A "domestic" insurer is one formed under the laws of this state.

(2) A "foreign" insurer is one formed under the laws of any jurisdiction other than this state.

(3) An "alien" insurer is one formed under the laws of any country other than the United States of America, its states, district, territories, and commonwealths.

(4) Except where distinguished by context, "foreign" insurer includes also an "alien" insurer.

(5) When used as to jurisdiction "state" means a state, District of Columbia, territory, commonwealth, or possession of the United States of America.

History: En. Sec. 6, Ch. 286, L. 1959.

40-2607. "Authorized," "unauthorized" insurer defined. (1) An "authorized" insurer is one duly authorized by subsisting certificate of authority issued by the commissioner, to transact insurance in this state.

(2) An "unauthorized" insurer is one not so authorized.

History: En. Sec. 7, Ch. 286, L. 1959.

Collateral References

Insurance \Rightarrow 1.

44 C.J.S. Insurance § 55.

40-2608. "Transacting" insurance. "Transact" with respect to insurance includes any of the following:

(1) Solicitation and inducement.

(2) Preliminary negotiations.

(3) Effectuation of a contract of insurance.

(4) Transaction of matters subsequent to effectuation of the contract of insurance and arising out of it.

History: En. Sec. 8, Ch. 286, L. 1959.

40-2609. Compliance required. No person shall transact a business of insurance in Montana, or relative to a subject resident, located or to be performed in Montana, without complying with the applicable provisions of this code.

History: En. Sec. 9, Ch. 286, L. 1959.

40-2610. Application of code as to particular types of insurers. No provision of this code shall apply with respect to:

(1) Domestic farm mutual insurers (as identified in chapter 48), except as stated in chapter 48 (farm mutual insurers);

(2) Domestic benevolent associations (as identified in chapter 49), except as stated in chapter 49 (benevolent associations); and

(3) Fraternal benefit societies, except as stated in chapter 53 (fraternal benefit societies).

History: En. Sec. 10, Ch. 286, L. 1959.

Mutual companies and benefit or fraternal societies as insurance companies.
63 ALR 735.

Collateral References

Insurance 687.

46 C.J.S. Insurance § 1435.

40-2611. Exempted organizations, activities. This code shall not apply to health service corporations, to the extent that the existence and operations of such corporations are authorized by section 15-1401 and related sections of the Revised Codes of Montana, 1947.

History: En. Sec. 11, Ch. 286, L. 1959.

40-2612. Existing certificates of authority and licenses. The expiration dates of certificates of authority and licenses in force immediately prior to the effective date of this code, and lawfully existing under any law repealed by this act, are extended as follows:

(1) Licenses or certificates of authority of insurers shall expire at midnight on May 31 next following such effective date.

(2) Licenses of agents and solicitors shall expire at midnight, May 31 next following such effective date.

Such certificates of authority and licenses, upon first renewal made under this code, shall be replaced by certificates of authority or licenses in form as provided by this code, and shall thereafter be subject to continuation, suspension, revocation or termination as though originally issued under this code.

History: En. Sec. 12, Ch. 286, L. 1959.

authority and licenses affected by this section is May 31, 1961.

Compiler's Note

The expiration date of certificates of

40-2613. Existing forms and filings. Every form of insurance document and every rate or other filing lawfully in use immediately prior to the effective date of this code may continue to be so used or be effective until the commissioner otherwise prescribes pursuant to this code; except, that before expiration of one year from and after such effective date neither this code nor the commissioner shall prohibit the use of any such document, rate, or filing because of any power, prohibition, or requirement contained in this code which did not exist under laws in force immediately prior to such effective date.

History: En. Sec. 13, Ch. 286, L. 1959.

Compiler's Note

The effective date referred to in this section is January 1, 1961.

40-2614. Existing domestic insurers. Any domestic insurer having a subsisting certificate of authority to transact insurance in this state immediately prior to the effective date of this code, whose law of incorpora-

tion or law under which formed is repealed by this act, shall continue to have a corporate existence (if a corporation) or existence (if other than a corporation) as though incorporated or formed under like provisions of this code; but all amendments to articles of incorporation shall be made hereafter in compliance with the applicable provisions of this code, and all such insurers shall be otherwise governed by the provisions of this code.

History: En. Sec. 14, Ch. 286, L. 1959.

Compiler's Note

The effective date referred to in this section is January 1, 1961.

40-2615. General saving clause. This act shall not impair or affect any act done, offense committed or right accruing, accrued, or acquired or liability, penalty, forfeiture or punishment incurred prior to the time this act takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if this act had not been passed.

History: En. Sec. 15, Ch. 286, L. 1959.

40-2616. Particular provisions prevail. Provisions of this code relative to a particular kind of insurance or a particular type of insurer or to a particular matter shall prevail over provisions relating to insurance in general or insurers in general or to such matter in general.

History: En. Sec. 16, Ch. 286, L. 1959.

40-2617. General penalty. Each violation of any provision of this code, with respect to which violation a greater penalty is not provided by other applicable laws of this state, shall, in addition to any administrative penalty otherwise applicable thereto, upon conviction in a court of competent jurisdiction of this state be punishable by a fine of not less than fifty dollars (\$50.00) nor more than one thousand dollars (\$1,000), or by imprisonment in the county jail for not less than thirty (30) days nor more than ninety (90) days, or by both such fine and imprisonment.

History: En. Sec. 17, Ch. 286, L. 1959.

Effective Date

Section 19 of Ch. 286, Laws 1959 read "Effective Date. This act shall become effective on January 1, 1961."

Separability Clause

Section 18 of Ch. 286, Laws 1959 read "Severability. If any section, subsection, subdivision, sentence, word, or provision of this act shall be determined by a court of competent jurisdiction to be unconstitutional or inoperative, such determination shall not affect the remaining portions of this act."

Collateral References

Insurance ~~22~~ 27.

44 C.J.S. Insurance § 86.

CHAPTER 27

THE COMMISSIONER OF INSURANCE

- Section 40-2701. Commissioner of insurance designated.
 40-2702. Insurance department.
 40-2703. Commissioner's seal.
 40-2704. Deputies and assistants.
 40-2705. Prohibited interests, rewards.
 40-2706. Delegation of authority.
 40-2707. Records.

- 40-2708. Certificates as evidence.
- 40-2709. General powers, duties.
- 40-2710. Rules and regulations.
- 40-2711. Orders, notices.
- 40-2712. Commissioner's annual report.
- 40-2713. Examination of insurers.
- 40-2714. Examination of agents, managers, promoters.
- 40-2715. Conduct of examination—records—correction of accounts—appraisals.
- 40-2716. Examination reports.
- 40-2717. Examination expense.
- 40-2718. Witnesses and evidence.
- 40-2719. Testimony compelled—immunity from prosecution.
- 40-2720. Hearings.
- 40-2721. Stay of action.
- 40-2722. Notice of hearing.
- 40-2723. Hearing procedure.
- 40-2724. Order on hearing.
- 40-2725. Appeals from the commissioner.
- 40-2726. Fees and licenses.

40-2701. Commissioner of insurance designated. The state auditor shall ex officio be the commissioner of insurance of this state.

History: En. Sec. 20, Ch. 286, L. 1959.

81 C.J.S. States § 63.

Collateral References

29 Am. Jur. 464, Insurance, §§ 48 et seq.

States◊10.

40-2702. Insurance department. (1) There is created an insurance department of this state, which shall be located in or convenient to the office occupied by the state auditor.

(2) The insurance department shall be under the control and supervision of the commissioner.

(3) Funds adequate for the maintenance and operation of the insurance department shall be expressly appropriated by the legislative assembly, and shall be used solely for the purposes for which so appropriated.

History: En. Sec. 21, Ch. 286, L. 1959.

44 C.J.S. Insurance § 57; 81 C.J.S. States § 66.

Collateral References

Insurance◊10; States◊45.

40-2703. Commissioner's seal. (1) The commissioner shall have a seal of office consisting of the same symbolic design within the inner circle as the Great Seal of the State of Montana, encircled by the words "Commissioner of Insurance, State of Montana."

(2) All certificates and licenses issued by the commissioner shall bear his seal, except that the commissioner may, in his discretion, omit the seal as to licenses.

History: En. Sec. 22, Ch. 286, L. 1959.

40-2704. Deputies and assistants. (1) The commissioner shall appoint a chief deputy insurance commissioner, who shall be in charge of the insurance department, under the direction and control of the commissioner.

(2) The commissioner may appoint additional deputy insurance commissioners for such purposes as he may designate.

(3) The commissioner may employ a competent insurance actuary, to perform actuarial duties, if any, of the department, to take charge of or

assist in the examination of insurers, and to perform other duties assigned to him.

(4) The commissioner may appoint or employ such examiners to conduct or assist in examinations of insurers and others provided for under the code, as may be competent, because of experience or special education or training, to fulfill the responsibilities of an insurance examiner.

(5) The commissioner shall appoint and employ a field investigator whose primary duty it shall be, as directed by the commissioner, to make investigations in this state of violations or claimed violations of this code.

(6) The commissioner may appoint a chief clerk for the insurance department, and employ such other assistants and clerks as may be necessary to assist him properly to discharge the duties imposed upon him under this code.

(7) The commissioner may at any time terminate the appointment, designation, or employment of any such deputy, actuary, chief clerk, or other employee.

(8) The commissioner may from time to time contract for and procure, on a fee or part time basis, or both, such actuarial, technical or other professional services as he may require for the discharge of his duties.

(9) The compensation of all such personnel so appointed, or employed, or contracted for by him shall be as fixed by the commissioner, but in the aggregate shall not exceed current funds appropriated by the legislative assembly to the insurance department or otherwise currently available for the purpose.

History: En. Sec. 23, Ch. 286, L. 1959.

Collateral References

States \Rightarrow 50.

81 C.J.S. States §§ 69, 90.

40-2705. Prohibited interests, rewards. (1) The commissioner or any deputy, examiner, assistant or employee of the commissioner shall not be financially interested, directly or indirectly, in any insurer, insurance agency, or insurance transaction except as a policyholder or claimant under a policy; except, that as to such matters wherein a conflict of interests does not exist on the part of any such individual, the commissioner may employ or retain from time to time insurance actuaries, attorneys, or other technicians who are independently practicing their professions even though similarly employed or retained by insurers or others.

(2) The commissioner or any deputy, examiner, or employee of the commissioner, shall not be given nor receive any fee, compensation, loan, gift, or other thing of value in addition to the compensation and expense allowance provided by law, for any service rendered or to be rendered as such commissioner, deputy, examiner, or employee or in connection therewith.

History: En. Sec. 24, Ch. 286, L. 1959.

40-2706. Delegation of authority. (1) The commissioner may delegate to any deputy, assistant, examiner or employee of his department, the exercise or discharge in the commissioner's name of any power, duty, or

function, whether ministerial or discretionary, vested by this code in the commissioner.

(2) The commissioner shall be responsible for the official acts of his deputy, assistant, examiner or employee acting in the commissioner's name and by his authority.

History: En. Sec. 25, Ch. 286, L. 1959.

40-2707. Records. The commissioner shall enter in permanent form records of his official transactions, examinations, investigations, and proceedings, and keep such records in his office. Such records and insurance filings in his office shall be open to public inspection, except as otherwise provided in this code with respect to particular records or filings.

History: En. Sec. 26, Ch. 286, L. 1959.

40-2708. Certificates as evidence. (1) Copies of records or documents in his office certified to by the commissioner shall be received in evidence in all courts as if they were the originals.

(2) The commissioner shall furnish, when required, his certificate as to the authority of any person to transact insurance, and such certificate shall be evidence of the facts set forth therein.

History: En. Sec. 27, Ch. 286, L. 1959.

40-2709. General powers, duties. (1) The commissioner shall enforce the provisions of this code, and shall execute the duties imposed upon him by this code.

(2) The commissioner shall have the powers and authority expressly conferred upon him by or reasonably implied from the provisions of this code.

(3) The commissioner may conduct such examinations and investigations of insurance matters, in addition to examinations and investigations expressly authorized, as he may deem proper to determine whether any person has violated any provision of this code or to secure information useful in the lawful administration of any such provision. The cost of such additional examinations and investigations shall be borne by the state.

(4) The commissioner shall have such additional powers and duties as may be provided by other laws of this state.

History: En. Sec. 28, Ch. 286, L. 1959.

44 C.J.S. Insurance § 57; 81 C.J.S. States § 66.

Collateral References

Insurance⌚3; States⌚68.

40-2710. Rules and regulations. (1) The commissioner may make reasonable rules and regulations necessary for or as an aid to effectuation of any provision of this code. No such rule or regulation shall extend, modify, or conflict with any law of this state or the reasonable implications thereof. Any such rule or regulation affecting persons or matters other than the personnel or the internal affairs of the commissioner's office shall be made or amended only after a hearing thereon of which notice was given as required by section 40-2722. If reasonably possible the commissioner shall set forth the proposed rule or regulation or amendment in or with the notice of hearing. No such rule or regulation or amendment as

to which a hearing is required shall be effective until it has been on file as a public record in the commissioner's office for at least ten (10) days.

(2) In addition to any other penalty provided, willful violation of any such rule or regulation shall subject the violator to such administrative penalties as may be applicable under this code as for violation of the provision as to which such rule or regulation relates.

History: En. Sec. 29, Ch. 286, L. 1959.

Collateral References

Recovery of cumulative statutory penalties for violations of regulations as to insurance. 71 ALR 2d 1010.

40-2711. Orders, notices. (1) Orders and notices of the commissioner shall not be effective unless in writing signed by him or by his authority.

(2) Every such order shall state its effective date and shall concisely state:

- (a) Its intent or purpose.
- (b) The grounds on which based.
- (c) The provisions of this code pursuant to which action is so taken or proposed to be taken; but failure to so designate a particular provision shall not deprive the commissioner of the right to rely thereon.

(3) Except as may be provided in this code respecting particular procedures, an order or notice may be given by delivery to the person to be ordered or notified or by mailing it, postage prepaid, addressed to him at his principal place of business as last of record in the commissioner's office. Such order or notice shall be deemed to have been given when so mailed.

History: En. Sec. 30, Ch. 286, L. 1959.

40-2712. Commissioner's annual report. As early in the calendar year as reasonably possible the commissioner annually shall prepare and deliver a report to the legislative assembly and the governor, showing, with respect to the preceding calendar year:

- (1) List of the authorized insurers transacting insurance in Montana, with such summary of their financial statement as he deems appropriate;
- (2) Names of all insurers whose business was closed during the year, the cause thereof, and amount of assets and liabilities as ascertainable;
- (3) Names of insurers against which delinquency or similar proceedings were instituted, and a concise statement of the facts with respect to each such proceeding and the status thereof;
- (4) A statement in regard to examination of rating organizations, advisory organizations, joint underwriters, and joint reinsurers as required by section 40-3627.
- (5) The receipts and expenses of the insurance department for the year.
- (6) Recommendations of the commissioner as to amendments or supplementation of laws affecting insurance, as to matters affecting the office of commissioner, and

(7) Such other pertinent information and matters as the commissioner deems proper.

History: En. Sec. 31, Ch. 286, L. 1959.

40-2713. Examination of insurers. (1) The commissioner shall examine the affairs, transactions, accounts, records, and assets of each authorized insurer as often as he deems advisable. He shall so examine each domestic insurer not less frequently than every three (3) years. Examination of an alien insurer may be limited to its insurance transactions and affairs in the United States. Examination of a reciprocal insurer may also include examination of its attorney-in-fact in so far as the transactions of the attorney-in-fact relate to the insurer.

(2) The commissioner shall in like manner examine each insurer applying for an initial certificate of authority to do business in this state.

(3) In lieu of making his own examination, the commissioner may, in his discretion, accept a full report of the last recent examination of a foreign or alien insurer, certified to by the insurance supervisory official of another state, territory, commonwealth, or district of the United States.

History: En. Sec. 32, Ch. 286, L. 1959.

Collateral References

Insurance ⌚ 10.

44 C.J.S. Insurance § 57.

40-2714. Examination of agents, managers, promoters. For the purpose of ascertaining compliance with this code, the commissioner may as often as he deems advisable examine the accounts, records, documents, and transactions, pertaining to or affecting its insurance affairs or proposed insurance affairs, of:

(1) Any insurance agent, solicitor, surplus line agent, general agent, or adjuster.

(2) Any person having a contract under which he enjoys in fact the exclusive or dominant right to manage or control an insurer.

(3) Any person holding the shares of voting stock or policyholder proxies of a domestic insurer, for the purpose of controlling the management thereof, as voting trustee or otherwise.

(4) Any person engaged in or proposing to be engaged in or assisting in the promotion or formation of a domestic insurer or insurance holding corporation, or corporation to finance a domestic insurer or the production of its business.

History: En. Sec. 33, Ch. 286, L. 1959.

Collateral References

Insurance ⌚ 10.

44 C.J.S. Insurance § 57.

40-2715. Conduct of examination—records—correction of accounts—appraisals. (1) The commissioner shall conduct any such examination at the home office (if a domestic or foreign insurer) or United States branch office (if an alien insurer) of the insurer, or in any of its branch or agency offices; or with respect to persons other than insurers, at the office or other place of business of such person or at any place or places where his records are kept.

(2) Every person being examined, its officers, employees, agents, and representatives shall produce and make freely available to the commissioner or his examiners the accounts, records, documents, files, information, assets, and matters in his possession or control relating to the subject of the examination; and shall otherwise facilitate and aid such examination as far as reasonably possible.

(3) If the commissioner finds accounts to be inadequate, or inadequately kept or posted, he may employ experts to rewrite, post, or balance them at the expense of the person being examined if such person has failed to complete or correct such accounting after the commissioner has given him notice and a reasonable opportunity to do so.

(4) If the commissioner deems it necessary to value any real estate involved in any such examination, he may make written request of the person being examined to appoint one or more competent appraisers approved by the commissioner, for the purpose of appraising such property. If no such appointment is made within ten (10) days after such request was delivered to such person, the commissioner may appoint the appraiser or appraisers. Any such appraisal shall be made promptly, and a copy of the report thereof shall be furnished to the commissioner. The reasonable expense of the appraisal shall be borne by the person being examined.

History: En. Sec. 34, Ch. 286, L. 1959.

40-2716. Examination reports. (1) The commissioner or his examiner shall make a full and true report of each examination, verified by his oath.

(2) The report shall comprise only facts appearing from the books, papers, records, or documents of the person being examined, or ascertained from the testimony, under oath, of individuals concerning its affairs, and conclusions and recommendations as warranted by such facts.

(3) The commissioner shall furnish a copy of the proposed report to the person examined not less than twenty (20) days prior to filing the same in his office. If such person so requests in writing within such twenty-day period, the commissioner shall grant a hearing with respect to the report, and shall not so file the report until after the hearing and after such modifications, if any, have been made therein as the commissioner deems proper.

(4) The report when so verified and filed shall be presumptive evidence, in any action or proceeding brought by the commissioner against the person examined, or against its officers or agents, of the facts stated therein. The commissioner and his examiners may at any time testify and offer other proper evidence as to information secured during the course of an examination, whether or not a written report of the examination has at that time been either made, served, or filed in the commissioner's office.

(5) The commissioner may withhold from public inspection any examination or investigation report for so long as he deems such withholding to be necessary for the protection of the person examined against unwarranted injury or to be in the public interest.

(6) If he deems such to be in the public interest the commissioner may publish any such examination report or a summary thereof in one or more newspapers in the state.

History: En. Sec. 35, Ch. 286, L. 1959.

Collateral References

Insurance 10.

44 C.J.S. Insurance § 73.

40-2717. Examination expense. (1) Each person so examined, other than as to examinations pursuant to section 40-2714, shall pay the actual travel expenses, a reasonable living expense allowance, and a per diem as compensation of examiners, as necessarily incurred on account of the examination, all at reasonable rates customary therefor and as established or adopted by the commissioner, upon presentation of a detailed account of such charges and expenses by the commissioner or pursuant to his written authorization. Such an account may be so presented periodically during the course of the examination or at the termination of the examination, as the commissioner deems proper. No person shall pay and no examiner shall accept any additional emolument on account of any such examination.

(2) There is created in the state treasury a special fund to be known as the "Insurance Department Examinations Revolving Fund." The commissioner shall pay to the state treasurer to the credit of this special fund all moneys received pursuant to subsection (1) above. This fund shall be used only for or toward payment of travel, living allowance and other expenses incurred by the commissioner and his examiners in the making of examinations (other than examinations of applicants for license as insurance agents or other representatives) under this code, and the compensation of such examiners, upon such bases as the commissioner may fix for the purposes of this subsection. In lieu of deposit thereof in such fund, the commissioner may give written authorization for payment, by the person examined, of such travel expenses and living allowance direct to the examiner. Any other law of this state to the contrary notwithstanding, the travel expense and living allowance of examiners shall be as fixed by the commissioner pursuant to this subsection. Any sums remaining in this special fund at the end of any fiscal period shall be carried forward and remain in the fund, and are hereby continuously appropriated for use as provided in this subsection.

(3) If any such person fails to pay the charges and expenses, as referred to in subsection (1) above, they shall be paid out of the funds of the commissioner in the same manner as other disbursements of such funds. The amount so paid shall be a first lien upon all of the assets and property in this state of such person, and may be recovered by suit by the attorney general on behalf of the state of Montana, and restored to the appropriate fund.

History: En. Sec. 36, Ch. 286, L. 1959.

40-2718. Witnesses and evidence. (1) With respect to the subject of any examination, investigation, or hearing being conducted by him the commissioner or his examiner, if general written authority therefor has been given the examiner by the commissioner, may subpoena witnesses and administer oaths or affirmations and examine any individual under oath, and may require and compel the production of records, books, papers, contracts, and other documents by attachments, if necessary. If in connection with any examination of an insurer the commissioner desires to examine any

officer, director or manager thereof who is then outside this state, the commissioner is authorized to conduct and to enforce by all appropriate and available means any such examination under oath in any other state or territory of the United States in which such officer, director or manager may then presently be, to the full extent permitted by the laws of such other state or territory, this special authorization considered.

(2) Witness fees and mileage, if claimed, shall be allowed the same as for testimony in a district court. Witness fees, mileage, and the actual expenses necessarily incurred in securing attendance of witnesses and their testimony shall be itemized, and shall be paid by the person being examined if such person is found to have been in violation of the law as to the matter with respect to which such witness was subpoenaed, or by the person, if other than the commissioner, at whose request the hearing is held.

(3) Subpoenas of witnesses shall be served in the same manner as if issued from a district court. If any individual fails to obey a subpoena lawfully served, the commissioner shall forthwith report such disobedience, together with a copy of the subpoena and proof of service thereof, to the district court for the county in which the individual was required to appear, and such court shall forthwith cause such individual to be produced and shall impose penalties as though he had disobeyed a subpoena issued out of such court.

(4) Any person willfully testifying falsely under oath as to any matter material to any such examination, investigation, or hearing, shall upon conviction thereof be guilty of perjury and punished accordingly.

(5) Any person willfully failing to attend, answer or produce records, documents or other evidence requested by the commissioner, or who willfully fails to give the commissioner full and truthful information and answer in writing to any material written inquiry of the commissioner, relative to to subject of any such examination, investigation, or hearing, or willfully fails to appear and testify under oath before the commissioner, shall upon conviction thereof, in addition to or in lieu of any other penalty or penalties applicable, be deemed guilty of a misdemeanor.

History: En. Sec. 37, Ch. 286, L. 1959.

44 C.J.S. Insurance § 57.

Collateral References

29 Am. Jur. 468, Insurance, §§ 52 et seq.

Insurance Ⓒ 10.

40-2719. Testimony compelled—immunity from prosecution. No person shall be excused from attending and testifying or producing any evidence upon any examination, investigation, or hearing conducted by or under authority of the commissioner, on the ground that his testimony or the evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No person shall be prosecuted or punished in any criminal action or proceeding for or on account of any act, transaction, matter or thing concerning which he is so compelled to produce evidence or to testify under oath, except for perjury committed in such testimony.

History: En. Sec. 38, Ch. 286, L. 1959.

40-2720. Hearings. (1) The commissioner may hold hearings for any purpose within the scope of this code deemed by him to be necessary.

(2) The commissioner shall hold a hearing if required by any provision, or upon written demand therefor by a person aggrieved by any act, threatened act or failure of the commissioner to act, or by any report, rule, regulation or order of the commissioner (other than an order for the holding of a hearing, or an order on hearing or pursuant thereto). Any such demand shall specify the grounds to be relied upon as a basis for the relief to be demanded at the hearing, and unless postponed by mutual consent, such hearing shall be held within thirty (30) days after receipt by the commissioner of demand therefor.

(3) If within such thirty (30) day period the commissioner does not either (a) grant the hearing, or (b) issue his order refusing the hearing, as to such previous report, rule, regulation, or order as to which such person so claims to be aggrieved, then the hearing shall thereby be deemed to have been refused.

History: En. Sec. 39, Ch. 286, L. 1959.

40-2721. Stay of action. (1) Such a demand for a hearing received by the commissioner prior to the effective date of any order issued by him or within ten (10) days after such order is delivered, shall stay the effectiveness of such order pending the hearing and an order made thereon, except as to action taken or proposed (a) under an order on hearing, or (b) under an order pursuant and supplemental to an order on hearing, or (c) under an order based upon impairment of assets or unsound financial condition of an insurer.

(2) If an automatic stay is not provided for and the commissioner after written request therefor fails to grant a stay, the person aggrieved may apply to the district court for Lewis and Clark county for a stay of the commissioner's proposed action.

History: En. Sec. 40, Ch. 286, L. 1959.

40-2722. Notice of hearing. Not less than ten (10) days in advance the commissioner shall give notice of the time and place of the hearing, stating the matters to be considered thereat. If the persons to be given notice are not specified in the provision pursuant to which the hearing is held, the commissioner shall give such notice to all persons whose pecuniary interests are to be directly and immediately affected by such hearing.

History: En. Sec. 41, Ch. 286, L. 1959.

DECISIONS UNDER FORMER LAW

Service of Order on Subsidiaries

Where two orders to show cause were directed to an alleged parent corporation said to have control over or ownership of two insurance companies licensed separately to do business within the state, because of the alleged wrongdoing of the alleged parent company, on the theory

that the three were one and the two had no separate corporate existence, the commissioner acquired no jurisdiction over the two companies, and writ of prohibition should issue, because the orders were not properly addressed. *State ex rel. Monarch Fire Ins. Co. v. Holmes*, 113 M 303, 307, 124 P 2d 994.

40-2723. Hearing procedure. (1) Hearings may be closed to the public at the commissioner's discretion, except that a hearing held with respect to a filing made under chapter 36 (rates and rating organizations)

prior to the effective date of such filing shall be closed to the public unless otherwise requested by the party that made such filing; in all other cases a hearing shall be open to the public if so requested in writing by any party to the hearing.

(2) The commissioner shall allow any party to the hearing to appear in person and by counsel, to be present during the giving of all evidence, to have a reasonable opportunity to inspect all documentary evidence and to examine witnesses, to present evidence in support of his interest, and to have subpoenas issued by the commissioner to compel attendance of witnesses and production of evidence in his behalf.

(3) The commissioner shall permit to become a party to the hearing by intervention, if timely, any person who was not an original party thereto and whose pecuniary interests are to be directly and immediately affected by the commissioner's order made upon the hearing.

(4) Formal rules of pleading or evidence need not be observed at any hearing.

(5) Upon written request seasonably made by a party to the hearing and at such person's expense, the commissioner shall cause a full stenographic record of the proceedings to be made by a competent reporter. If transcribed a copy of such stenographic record shall be furnished to the commissioner, without cost to the commissioner or the state, and shall be a part of the commissioner's record of the hearing. If so transcribed a copy of such stenographic record shall be furnished to any other party to such hearing at the request and expense of such other party. If no stenographic record is made or transcribed, the commissioner shall prepare an adequate record of the evidence and of the proceedings.

(6) Upon written request of a party to a hearing filed with the commissioner within thirty (30) days after any order made pursuant to a hearing has been mailed or delivered to the persons entitled to receive the same, the commissioner may, in his discretion, grant a rehearing or reargument of the matters involved in such hearing, and notice of such rehearing or reargument shall be given as provided in section 40-2722.

History: En. Sec. 42, Ch. 286, L. 1959.

40-2724. Order on hearing. (1) In conducting any such hearing the commissioner shall sit in a quasi judicial capacity. Within thirty (30) days after termination of the hearing or of any rehearing thereof or reargument thereon, he shall make his order on hearing, covering matters involved in such hearing and in any rehearing or reargument thereof, and shall give a copy of such order to the same persons given notice of the hearing.

(2) The order shall contain a concise statement of the facts as found by the commissioner, and of his conclusions therefrom, and the matters required by section 40-2711.

(3) The order may affirm, modify, or nullify action theretofore taken or may constitute the taking of new action within the scope of the notice of hearing.

History: En. Sec. 43, Ch. 286, L. 1959.

40-2725. Appeals from the commissioner. (1) An appeal from the commissioner shall be taken only from an order on hearing or with respect to a matter as to which the commissioner has refused a hearing. Any person who was a party to such hearing, or whose pecuniary interests are directly and immediately affected by any such order or refusal and who is aggrieved thereby may, within thirty (30) days after (a) the order has been mailed or delivered to the persons entitled to receive the same, or (b) the commissioner's order denying rehearing or reargument has been so mailed or delivered, or (c) the commissioner's refusal to grant a hearing, appeal from such order on hearing or such refusal of a hearing. The appeal shall be taken to the district court of Lewis and Clark county, by filing written notice of appeal in such court and by filing a copy of such notice with the commissioner; except, that in appeals from the suspension or revocation of the certificate of authority of a domestic insurer or of the license of an agent, solicitor, or surplus line agent, the person taking the appeal may, at his option, in lieu of the district court of Lewis and Clark county, take the appeal to the district court of the county of Montana in which the insurer has its principal place of business or the licensee resides.

(2) Upon filing of the notice of appeal therein the court shall have full jurisdiction, and shall determine whether such filing shall operate as a stay of the order or action appealed from, except that in the following instances the filing of the notice of appeal shall automatically stay the order appealed from pending the judgment of the district court on the appeal:

(a) Appeal from suspension or revocation of the license of an agent, solicitor or surplus line agent.

(b) Appeal from suspension or revocation of the certificate of authority of an insurer.

(3) Within twenty (20) days after filing of the copy of the notice of appeal in his office, the commissioner shall make and return to the court in which the appeal is pending a copy of his order appealed from and a full and complete transcript, duly certified by the commissioner, of his record of the hearing upon which the order was issued, together with all exhibits and documentary evidence introduced thereat. If the appeal is from an action of the commissioner with respect to which a hearing was refused, the commissioner shall within such twenty (20) day period make and return to the court a full and complete transcript, duly certified by him, of all documents on file in his office directly relating to the matter as to which such appeal is taken.

(4) Upon receipt of such transcripts and evidence the court shall hear the matter de novo as soon as reasonably possible thereafter. Upon the hearing of the appeal the court shall consider the evidence contained in the transcript, exhibits, and documents therein filed by the commissioner, together with such additional proper evidence as may be offered by any party to the appeal.

(5) After hearing the appeal the court may affirm, modify or reverse the order or action of the commissioner in whole or in part, or remand the

action to the commissioner for further proceedings in accordance with the court's direction.

(6) Costs shall be awarded as in civil actions.

(7) Appeal may be taken to the supreme court from the judgment of the district court as in other civil cases to which the state is a party. A stay of the effectiveness of any such judgment may be made only by order of the supreme court upon the giving of such security as that court deems proper.

(8) This section shall not apply to appeals as to matters covered by chapter 36 of this title (rates and rating organizations), and for which appeal is provided for under section 40-3633.

History: En. Sec. 44, Ch. 286, L. 1959.

Collateral References

Cross-Reference

Insurance Ⓒ 10.

Application of Montana Rules of Civil Procedure to this section, sec. 93-2711-7.

44 C.J.S. Insurance § 58.

DECISIONS UNDER FORMER LAW

Stay of Order Pending Appeal

Contention that the appeal provided for by former section 40-1106 from an order of revocation was inadequate because there was no provision for a stay pending appeal, held without merit since, under the general rule, an appeal in a matter tried

de novo in the appellate tribunal operates automatically to stay the commissioner's order, to deprive him of any further jurisdiction, and to prevent him from publishing the order pending the appeal. State ex rel. Pearl Assurance Co. v. Holmes, 113 M 144, 148, 124 P 2d 700.

40-2726. Fees and licenses. (1) The commissioner shall collect in advance, and the persons so served shall so pay to the commissioner, the following fees and licenses:

(a) Certificates of authority.

(i) Application for original certificate of authority: For filing applications for certificate of authority, articles of incorporation (except as provided in subsection (b), below) and other charter documents, bylaws, financial statement, examination report, power of attorney to the commissioner, and all other documents and filings required in connection with such application, and for issuance of an original certificate of authority, if issued:

Domestic insurers\$ 30.00

Foreign insurers 300.00

(ii) Annual continuation of certificate of authority 25.00

(iii) Reinstatement of certificate of authority 25.00

(b) Articles of incorporation:

(i) Filing original articles of incorporation of domestic insurer, exclusive of fees required to be paid by the corporation to the secretary of state 20.00

(ii) Filing amendment of articles of incorporation, domestic and foreign insurers, exclusive of fees required to be paid to the secretary of state by a domestic corporation 10.00

(c) Filing bylaws or amendment thereto, where required 5.00

(d) Filing annual statement of insurer, other than as part of application for original certificate of authority 25.00

(e) Agent's license, property, casualty, surety, title insurance agents, and including disability insurance without additional license or fee when written by property, casualty, or surety insurer otherwise represented by the agent:

(i) Application for original license, and including issuance of license, if issued	10.00
(ii) Appointment of agent, each insurer	5.00
(iii) Annual renewal or appointment of agent, each insurer	5.00
(iv) Temporary license	10.00
(f) Solicitor's license:	
(i) Application for original license, including issuance of license, if issued	5.00
(ii) Annual continuation of license	5.00
(g) Agent's license, life, disability insurance:	
(i) Application for original license, each insurer	5.00
(ii) Annual continuation or renewal of license, each insurer	5.00
(iii) Temporary license, each insurer	5.00
(h) Examination for license as agent or solicitor, each examination	10.00
(i) Surplus line agent's license:	
(i) Application for original license and for issuance of license, if issued	25.00
(ii) Annual renewal or continuation of license	25.00
(j) Adjuster's license:	
(i) Application for original license and for issuance of license, if issued	10.00
(ii) Annual continuation or renewal of license	10.00
(k) Insurance vending machine license, each machine, each year	10.00
(l) Commissioner's certificate under seal (except when on certificates of authority or licenses)	1.00
(m) Copies of documents on file in the commissioner's office, per page50
(2) The commissioner shall promptly deposit with the state treasurer to the credit of the general fund of this state all fees and licenses received by him under this section.	
(3) The fees provided for in this section shall be in lieu of all fees heretofore payable with respect to insurance or insurers under section 25-101.	

History: En. Sec. 45, Ch. 286, L. 1959.

Collateral References

Insurance 7.

44 C.J.S. Insurance § 71.

29 Am. Jur. 472, Insurance, § 55.

Discrimination by state against foreign corporations in imposition of taxes and license fees. 49 ALR 726.

Constitutionality of statutes requiring payment to state of fee on appointment of agent by foreign insurance company. 60 ALR 1172.

CHAPTER 28

AUTHORIZATION OF INSURERS AND GENERAL REQUIREMENTS

Section 40-2801. Certificate of authority required—in general.

40-2802. Exceptions, certificate of authority requirement.

- 40-2803. Admission for investment only.
- 40-2804. General eligibility of insurers.
- 40-2805. Name of insurer.
- 40-2806. Combinations of insuring powers, one insurer.
- 40-2807. Capital funds required.
- 40-2808. Special surplus required.
- 40-2809. Deposit requirement.
- 40-2810. Management and affiliations.
- 40-2811. Application for certificate of authority.
- 40-2812. Issuance or refusal of authority—ownership of certificate.
- 40-2813. Continuance, expiration, reinstatement and amendment of certificate of authority.
- 40-2814. Mandatory revocation, suspension of certificate of authority.
- 40-2815. Suspension or revocation for violations and special grounds.
- 40-2816. Notice of suspension or revocation—effect upon agent's authority.
- 40-2817. Duration of suspension—insurer's obligations—reinstatement.
- 40-2818. Commissioner attorney for service of process.
- 40-2819. Serving process—time to plead.
- 40-2820. Annual statement.
- 40-2821. Tax.
- 40-2822. Resident agent required—countersignature—records—exceptions.
- 40-2823. Salaried personnel cannot countersign—exception for emergencies.
- 40-2824. Policies originating outside state, commission of resident agent.
- 40-2825. Policies issued at home or branch offices.
- 40-2826. Retaliation.

40-2801. Certificate of authority required—in general. (1) No person shall act as an insurer and no insurer shall transact insurance in this state except as authorized by a subsisting certificate of authority issued to it by the commissioner, except as to such transactions as are expressly otherwise provided for in this code.

(2) No insurer shall have or maintain in Montana any office, representative, or other facilities for the solicitation or servicing of any kind of insurance in any other state unless it is then authorized to transact the same kind of insurance in this state.

History: En. Sec. 46, Ch. 286, L. 1959.

44 C.J.S. Insurance § 69.

Cross-Reference

Carrying on business without license, penalty, sec. 94-1511.

Failure to procure license as affecting validity or enforceability of contract. 30 ALR 866.

Collateral References

Insurance⌘5.

What constitutes doing business within state by foreign insurance corporation. 137 ALR 1128.

40-2802. Exceptions, certificate of authority requirement. A certificate of authority shall not be required of an insurer, not otherwise authorized in this state, as to the following transactions:

(1) Transactions relative to its policies lawfully written in Montana, or liquidation of assets and liabilities of the insurer (other than collection of new premiums), all as resulting from its former authorized operations in Montana.

(2) Transactions relative thereto subsequent to issuance of a policy covering only subjects of insurance not resident, located, or expressly to be performed in Montana at time of issuance, and which coverage was lawfully solicited, written, and delivered outside Montana.

(3) Transactions pursuant to surplus lines coverages lawfully written pursuant to chapter 34 of this title.

(4) Reinsurance, except as to domestic reinsurers.

History: En. Sec. 47, Ch. 286, L. 1959.

Collateral References

Reinsurance by foreign insurance corporation as doing business within state. 137 ALR 1141.

40-2803. Admission for investment only. A foreign insurer may transact business in this state without certificate of authority, for the purpose and to the extent only of investing its funds in Montana real estate or in securities secured thereby by complying with the applicable laws of this state other than this code. Such an insurer shall not be subject to any other provision of this code.

History: En. Sec. 48, Ch. 286, L. 1959.

40-2804. General eligibility of insurers. To qualify for and hold authority to transact insurance in this state an insurer must be otherwise in compliance with this code and with its charter powers, and must be an incorporated stock insurer, or an incorporated mutual insurer, or a reciprocal insurer, all of the same general type as may hereafter be formed as a domestic insurer under this code; except that:

(1) No foreign insurer shall be authorized to transact insurance in Montana which does not maintain reserves as required by chapter 30 of this title applicable to the kind or kinds of insurance transacted by such insurer, wherever transacted in the United States; or which transacts business anywhere in the United States on the assessment plan, or stipulated premium plan, or any similar plan.

(2) No foreign insurer which is directly or indirectly owned or controlled in whole or in substantial part by any government or governmental agency shall be authorized to transact insurance in Montana unless it was so owned and first so authorized prior to January 1, 1957. Membership or subscribership in a mutual or reciprocal insurer by virtue of being a policyholder thereof, or ownership of stock or other security which does not have voting rights with respect to the management of the insurer, or supervision of an insurer by public authority, shall not be deemed to be an ownership or control of the insurer for the purposes of this provision.

History: En. Sec. 49, Ch. 286, L. 1959.

Collateral References

Insurance—1.

44 C.J.S. Insurance § 91.

29 Am. Jur. 470, Insurance, § 53.

Personal liability of public officials or their bonds for permitting insurance company to engage or continue in business without complying with statutory requirements. 131 ALR 275.

DECISIONS UNDER FORMER LAW

Foreign Corporations

Former chapter 14 of this title contained a distinct system with relation to stock and mutual insurance companies. This system extended to associations to be formed in the state, and to foreign insurance companies as well. State ex rel. Aachen & Munich F. Ins. Co. v. Rotwitt, 17 M 41, 50, 41 P 1004.

Unincorporated Associations

Former section 40-1301, expressly author-

izing unincorporated associations organized under the laws of the United States, or any of its states or territories, to engage in the insurance business in Montana, was a special statute and such associations were, therefore, unaffected by the general one (sec. 93-6401), providing that a civil action may be brought in the name of the state against an association which acts as a corporation without being legally incorporated. State ex rel. v. Porter, 88 M 347, 349 et seq., 294 P 363.

40-2805. Name of insurer. (1) No insurer shall be authorized to transact insurance in this state which has or uses a name so similar to that of another insurer already so authorized as likely to mislead the public.

(2) No life insurer shall be authorized which has or uses a name deceptively similar to that of another insurer authorized to transact insurance in this state within the preceding ten (10) years if life insurance policies originally issued by such other insurer are still outstanding in this state.

(3) No insurer shall be so authorized which has or uses a name which tends to deceive or mislead as to the type of organization of the insurer.

(4) In case of conflict of names between two insurers, or a conflict otherwise prohibited under the foregoing subsections of this section, the commissioner may permit or require the more recently authorized insurer to use in Montana such supplementation or modification of its name or such business name as may reasonably be necessary to avoid such conflict.

History: En. Sec. 50, Ch. 286, L. 1959.

40-2806. Combinations of insuring powers, one insurer. An insurer which otherwise qualifies therefor may be authorized to transact any one kind or combination of kinds of insurance as defined in chapter 29 of this title, except:

(1) A life insurer may also grant annuities, but shall not be authorized to transact any other kind of insurance other than disability; except, that if the insurer is otherwise qualified therefor the commissioner shall continue to so authorize any life insurer which, immediately prior to the effective date of this code, was lawfully authorized to transact in this state a kind or kinds of insurance in addition to life and disability.

(2) A reciprocal insurer shall not transact life insurance.

(3) A title insurer shall be a stock insurer.

History: En. Sec. 51, Ch. 286, L. 1959.

Collateral References

Insurance 36, 57.

44 C.J.S. Insurance §§ 99, 110.

40-2807. Capital funds required. (1) To qualify for authority to transact any one kind (as defined in chapter 29) of insurance, or combinations of kinds of insurance as shown below, an insurer shall possess and thereafter maintain unimpaired paid-in capital stock (if a stock insurer) or surplus (if a foreign mutual or foreign reciprocal insurer) in amount not less than as applicable under the schedule below and shall possess when first so authorized such additional funds as surplus as required under section 40-2808:

Kind or kinds of insurance	Minimum capital or surplus required
Life	\$100,000.00
Disability	100,000.00
Life and disability	150,000.00
Property	200,000.00
Marine	200,000.00
Casualty	
All lines except workmen's compensation.....	200,000.00
All lines, including workmen's compensation..	300,000.00

Surety	250,000.00
Title	100,000.00
Multiple lines (two or more: property, marine, casualty or surety)	400,000.00

Except, that an insurer holding a valid certificate of authority to transact insurance in this state immediately prior to the effective date of this code may, if otherwise qualified therefor, continue to be so authorized for a period of five (5) years from such effective date by maintaining the same amount of paid-in capital stock (if a stock insurer) or the same amount of surplus (if a mutual or reciprocal insurer) as required by the laws of this state for such authority immediately prior to such effective date, and shall after expiration of such five-year period have or receive authority to transact insurance in this state only if otherwise qualified therefor while having and maintaining paid-in capital stock (if a stock insurer) or surplus (if a mutual or reciprocal insurer) in applicable amount as otherwise required under this section; except, further, that any such insurer shall not, within such five-year period, be granted authority to transact any other or additional kind of insurance unless it then fully complies with the requirements as to capital and surplus, as applied to all kinds of insurance it then proposes to transact, as provided by this code as to insurers applying for original certificates of authority under this code.

(2) As to surplus required for qualification to transact one or more kinds of insurance and thereafter to be maintained, domestic mutual insurers shall be governed by chapter 47, and domestic reciprocal insurers shall be governed by chapter 50.

(3) Capital and surplus requirements shall be based upon all the kinds of insurance actually transacted or to be transacted by the insurer in any and all areas in which it operates, whether or not only a portion of such kinds are to be transacted in this state.

(4) A life insurer may also grant annuities without additional capital or additional surplus.

History: En. Sec. 52, Ch. 286, L. 1959.

Collateral References

Insurance 8, 33.

44 C.J.S. Insurance §§ 96, 112.

23 Am. Jur. 203, Foreign Corporations, §§ 234 et seq.; 29 Am. Jur. 472, Insurance, § 56.

DECISIONS UNDER FORMER LAW

Sufficiency of Funds

Where the members of an unincorporated association seeking to carry on a fire insurance business deposited with the insurance commissioner of the state of the association's creation approved securities aggregating \$900,000, he being empowered to require additional securities in case those deposited should depreciate in value; the securities remained the property of the individuals but could not be withdrawn until all their proportionate liability against them had been discharged; there was no joint liability on the part of the members of the association; actions on the policies could be commenced against,

and service of process had upon, the attorney-in-fact of the association, authorized to write insurance for it; since the deposited securities could not be withdrawn so long as there existed an outstanding obligation chargeable against them, but were set aside and dedicated to the business of the association as a final guaranty of the payment of all losses sustained under its policies of insurance, they constituted capital stock in an amount in excess of that prescribed by former section 40-1422, and therefore, refusal of a license based on insufficiency of capital was not warranted. State ex rel. v. Porter, 88 M 347, 351 et seq., 294 P 363.

40-2808. Special surplus required. In addition to the minimum paid-in capital stock (stock insurers) or minimum surplus (mutual and reciprocal insurers) required by section 40-2807, special surplus shall be possessed by insurers as follows:

(1) All stock insurers and foreign mutual and foreign reciprocal insurers which have actively transacted insurance in their state of domicile as an authorized insurer for less than five (5) years, or, if an alien insurer, have transacted insurance as an authorized insurer in at least one state of the United States for less than five (5) years, when first authorized to transact insurance in this state shall have a surplus or additional surplus equal to not less than one hundred per cent (100%) of the paid-in capital stock (if a stock insurer) or surplus (if a foreign mutual or foreign reciprocal) otherwise required under section 40-2807 for the kinds of insurance to be transacted.

(2) Insurers that have actively transacted insurance as authorized insurers in one or more states of the United States for more than five (5) years shall possess when first authorized in this state, surplus or additional surplus equal to not less than fifty per cent (50%) of the paid-in capital stock (if a stock insurer) or surplus (if a foreign mutual or foreign reciprocal insurer) otherwise required under section 40-2807.

(3) Insurers authorized to transact multiple lines of insurance in this state shall at all times have and maintain surplus of not less than one hundred thousand dollars (\$100,000), in addition to the capital (if a stock insurer) or surplus (if a foreign mutual or foreign reciprocal insurer) required by section 40-2807. The amount of such surplus shall be included within the surplus required of newly authorized insurers pursuant to subdivisions (1) and (2) of this section.

History: En. Sec. 53, Ch. 286, L. 1959.

40-2809. Deposit requirement. (1) An insurer shall not be authorized to transact insurance in this state unless it makes and thereafter maintains in trust in this state through the commissioner for the protection of all its policyholders or of all its policyholders and creditors, a deposit of cash or securities eligible for deposit under section 40-3203 in an amount not less than the minimum paid-in capital stock (if a stock insurer) or minimum surplus (if a mutual or reciprocal insurer), other than special surplus, required to be maintained for authority to transact the kinds of insurance to be transacted, except:

(a) As to title insurers, the deposit shall be in the amount of fifty thousand dollars (\$50,000).

(b) As to foreign insurers, in lieu of such deposit or part thereof in this state, the commissioner shall accept the certificate in proper form of the public official having supervision over insurers in any other state to the effect that a like deposit or part thereof by such insurer is being maintained in public custody therein in trust for the purpose, (among other reasonable purposes of protection of policyholders and/or creditors) of the protection of all its policyholders, or policyholders and creditors, in Montana.

(c) As to alien insurers, in lieu of such deposit or part thereof in this state, the commissioner shall accept evidence satisfactory to him that the insurer maintains within the United States by way of trust deposits with public depositories, or in trust institutions approved by the commissioner, assets available for discharge of its United States insurance obligations which assets shall be in amount not less than the outstanding liabilities of the insurer arising out of its insurance transactions in the United States, together with the larger of the following sums: (i) The largest deposit required by this code to be made by foreign insurers transacting like kinds of insurance, or (ii) three hundred thousand dollars (\$300,000).


(2) Deposits of foreign or alien insurers in another state shall be in cash and/or securities of substantially the same quality as those eligible for deposit in this state under section 40-3203.

(3) Deposits of reserves by domestic life insurers shall be made as provided in section 40-3012.

(4) Deposits made in this state shall further be subject to the provisions of chapter 32 (administration of deposits).

History: En. Sec. 54, Ch. 286, L. 1959.

Collateral References

Insurance  8.

44 C.J.S. Insurance § 72.

29 Am. Jur. 473, Insurance, § 57.

40-2810. Management and affiliations. The commissioner shall not grant or continue authority to transact insurance in this state as to any insurer the principal management personnel of which is found by him to be untrustworthy or not of good character, or so lacking in insurance company managerial experience as to make the proposed operation hazardous to the insurance-buying public or to its stockholders; or which he has good reason to believe is affiliated directly or indirectly through ownership, control, management, reinsurance transactions or other insurance or business relations, with any person or persons whose business operations, to the detriment of insurers, stockholders, or creditors, are or have been marked by manipulation of assets, of accounts, or of reinsurance, or by bad faith.

History: En. Sec. 55, Ch. 286, L. 1959.

40-2811. Application for certificate of authority. To apply for an original certificate of authority an insurer shall file with the commissioner its application therefor (accompanied by the applicable fees as specified in section 40-2726) showing its name, location of its home office or principal office in the United States (if an alien insurer), kinds of insurance to be transacted, date of organization or incorporation, form of organization, state or country of domicile, and such additional information as the commissioner may reasonably require, together with the following documents, as applicable:

(1) If a foreign insurer, a copy of its corporate charter, or articles of incorporation, with all amendments thereto, certified by the public officer with whom the originals are on file in the state or country of domicile.

(2) If a mutual insurer, a copy of its bylaws as amended, certified by its secretary or other officer having custody thereof.

(3) If a reciprocal insurer, copies of the power of attorney of its attorney-in-fact and of its subscribers' agreement, if any, certified by its attorney-in-fact.

(4) A copy of its financial statement as of December 31 next preceding, sworn to by at least two (2) executive officers of the insurer, or certified by the public insurance supervisory official of the insurer's state of domicile or of entry into the United States.

(5) Copy of report of last examination, if any, made of the insurer, certified by the insurance supervisory official of its state of domicile or of entry into the United States.

(6) Appointment of the commissioner pursuant to section 40-2818, as its attorney to receive service of legal process.

(7) If a foreign or alien insurer, a certificate of the public official having supervision of insurance in its state or country of domicile, or state of entry into the United States, showing that it is authorized to transact the kinds of insurance proposed to be transacted in this state.

(8) If an alien insurer, a copy of the appointment and authority of its United States manager, certified by its officer having custody of its records.

(9) If a foreign insurer, certificate as to deposit if to be tendered pursuant to section 40-2809.

(10) Specimen copies of policies proposed to be offered in this state, together with premiums or premium rates applicable, or a declaration that such rates as applicable will be those promulgated by designated rating organizations authorized to file such rates in this state on behalf of the insurer.

History: En. Sec. 56, Ch. 286, L. 1959.

Collateral References

Insurance⌘5.

44 C.J.S. Insurance §§ 69, 79.

23 Am. Jur. 203, Foreign Corporations, §§ 234 et seq.; 29 Am. Jur. 470, Insurance, § 53; 33 Am. Jur. 321 et seq., Licenses.

40-2812. Issuance or refusal of authority—ownership of certificate.

(1) If upon completion of its application the commissioner finds that the insurer has met the requirements for and is entitled thereto under this code, he shall issue to the insurer a proper certificate of authority; if he does not so find, the commissioner shall issue his order refusing such certificate. The commissioner shall act upon an application for a certificate of authority within thirty (30) days after its completion.

(2) The certificate, if issued, shall specify the kind or kinds of insurance the insurer is authorized to transact in Montana. At the insurer's request, the commissioner may issue a certificate of authority limited to particular types of insurance or insurance coverages within the scope of a kind of insurance as defined in chapter 29 of this title.

(3) Although issued to the insurer the certificate of authority is at all times the property of the state of Montana. Upon any expiration, suspension, or termination thereof the insurer shall promptly deliver the certificate of authority to the commissioner.

History: En. Sec. 57, Ch. 286, L. 1959.

Collateral References

Insurance⌘5.

44 C.J.S. Insurance §§ 69, 79; 46 C.J.S. Insurance § 1413.

29 Am. Jur. 470, Insurance, §§ 53 et seq.; 33 Am. Jur. 376, Licenses, §§ 59 et seq.

Personal liability of public officials or their bonds, for permitting insurance company to engage or continue in busi-

ness without complying with statutory requirements. 131 ALR 275.

DECISIONS UNDER FORMER LAW

Estoppel by Exercise of Authority

Under rule that one who has acted under a statute or has claimed its benefits to the detriment of others may not question its constitutionality, mutual fire insurance companies which had entered into contracts of insurance with the state with relation to its public buildings on the strength of former section 40-1423, authorizing such companies to write insurance on the mutual plan (on the single cash

premium plan) if permitted to do so by the laws of their states, were estopped thereafter from asserting, in case of fire loss, that the section was unconstitutional in that, under it, they were given a right which by section 40-1431 was denied to domestic corporations of the same character, contrary to Sec. 11, Art. XV, Constitution of Montana. *McMahon v. Cooney et al.*, 95 M 138, 142 et seq., 25 P 2d 131.

40-2813. Continuance, expiration, reinstatement and amendment of certificate of authority. (1) Certificates of authority issued or renewed under this code shall continue in force as long as the insurer is entitled thereto under this code and until suspended or revoked, or otherwise terminated; subject, however, to continuance of the certificate by the insurer each year by payment prior to May 15th of the continuation fee provided in section 40-2726.

(2) If not so continued by the insurer, its certificate of authority shall expire as at midnight on May 31 next following such failure of the insurer so to continue it in force. The commissioner shall promptly notify the insurer of the occurrence of any such failure resulting in impending expiration of its certificate of authority.

(3) The commissioner may, in his discretion, reinstate a certificate of authority which the insurer has inadvertently permitted to expire, after the insurer has fully cured all its failures which resulted in such expiration, and upon payment by the insurer of the fee for reinstatement in addition to the current continuation fee, as provided in section 40-2726. Otherwise, the insurer shall be granted another certificate of authority only after filing application therefor and meeting all other requirements as for an original certificate of authority in this state.

(4) The commissioner may amend a certificate of authority at any time to accord with changes in the insurer's charter of insuring powers.

History: En. Sec. 58, Ch. 286, L. 1959.

Collateral References

Withdrawal of foreign insurance com-

pany from state as affecting conditions under which it may be readmitted to do business in state and its rights and duties if readmitted. 110 ALR 528.

40-2814. Mandatory revocation, suspension of certificate of authority.

(1) The commissioner shall suspend or revoke an insurer's certificate of authority:

(a) If such action is required by any provision of this code;

(b) If the insurer no longer meets the requirements for the authority originally granted, on account of deficiency of assets or otherwise; or

(c) If the insurer's authority to transact insurance is suspended or revoked by its state of domicile, or state of entry into the United States if an alien insurer.

(2) Except in cases of insolvency or impairment of required capital or surplus, or suspension or revocation by another state as referred to in subdivision (c) above, the commissioner shall give the insurer at least fifteen (15) days' notice in advance of any such suspension or revocation under this section.

History: En. Sec. 59, Ch. 286, L. 1959.

Collateral References

Insurance 5, 10.

44 C.J.S. Insurance §§ 74, 79.

Personal liability of public officials or their bonds for permitting insurance company to engage or continue in business without complying with statutory requirements. 131 ALR 275.

DECISIONS UNDER FORMER LAW

Powers of Commissioner

The state auditor and ex officio commissioner of insurance, had general jurisdiction, under Art. VII, Sec. 1, Constitution, and former sections 40-1105 and 40-1106, of matters relating to insurance, and had

the power, under certain circumstances enumerated in the statutes, to revoke certificates of authority of insurance companies to do business in the state. *State ex rel. Pearl Assurance Co. v. Holmes*, 113 M 144, 146, 124 P 2d 700.

40-2815. Suspension or revocation for violations and special grounds.

(1) The commissioner may, in his discretion, suspend or revoke an insurer's certificate of authority if, after a hearing thereon, he finds that the insurer has violated any lawful order of the commissioner or any provision of this code other than those for which suspension or revocation is mandatory.

(2) The commissioner shall, after a hearing thereon, suspend or revoke an insurer's certificate of authority if he finds that the insurer:

(a) Is in unsound condition, or in such condition, or using such methods or practices in the conduct of its business, as to render its further transaction of insurance in Montana injurious or hazardous to its policyholders or to the public.

(b) Has refused to be examined or to produce its accounts, records, and files for examination, or if any of its officers have refused to give information with respect to its affairs, when required by the commissioner.

(c) Has failed to pay any final judgment rendered against it in Montana within thirty (30) days after the judgment became final.

(d) With such frequency as to indicate its general business practice in Montana, has without just cause refused to pay proper claims arising under its policies, whether any such claim is in favor of an insured or is in favor of a third person with respect to the liability of an insured to such third person, or without just cause compels such insured or claimant to accept less than the amount due them or to employ attorneys or to bring suit against the insurer or such an insured to secure full payment or settlement of such claims.

(e) Is affiliated with and under the same general management or interlocking directorate or ownership as another insurer which transacts direct insurance in Montana without having a certificate of authority therefor, except as permitted as to a surplus line insurer under chapter 34.

(3) The commissioner may, in his discretion and without advance notice or a hearing thereon, immediately suspend the certificate of authority of any insurer as to which proceedings for receivership, conservatorship,

rehabilitation, or other delinquency proceedings, have been commenced in any state.

History: En. Sec. 60, Ch. 286, L. 1959.

DECISIONS UNDER FORMER LAW

Mandate for Revocation of License

Where a surety company did not perfect its appeal from a judgment in an action on a constable's bond until the ninety-fifth day after rendition but its undertaking on appeal was satisfactory to the judgment creditor, refusal to grant the creditor a writ of mandate against the commissioner to compel revocation of the company's license was not error since plaintiff's rights were fully protected and could not be affected either by the issuance or denial of the writ, and the effect of its issuance would have been the destruction of the company's business in the state without an opportunity to be heard, it not being a party to the original action. *Stabler v. Porter*, 72 M 62, 64, 232 P 187.

Powers of Commissioner

The state auditor and ex officio commissioner of insurance, had general jurisdiction, under Art. VII, Sec. 1, Constitution, and former sections 40-1105 and 40-1106, of matters relating to insurance, and had the power, under certain circumstances enumerated in the statutes, to revoke certificates of authority of insurance companies to do business in the state. *State ex rel. Pearl Assurance Co. v. Holmes*, 113 M 144, 146, 124 P 2d 700.

Quo Warranto

Obiter: Where the license of a surety company is sought to be revoked for failure to pay a judgment rendered against it in an action on a bond furnished by it, quo warranto may be resorted to. *Stabler v. Porter*, 72 M 62, 64, 232 P 187.

40-2816. Notice of suspension or revocation—effect upon agent's authority. (1) Upon suspending or revoking an insurer's certificate of authority the commissioner shall forthwith give notice thereof to the insurer and to its agents in this state of record in the commissioner's office.

(2) Such suspension or revocation shall likewise automatically suspend or revoke, as the case may be, the authority of all such agents to act as agents of the insurer in this state, and the commissioner shall so state in the notice to agents provided for in subsection (1).

(3) In his discretion the commissioner may also publish notice of such revocation in one or more newspapers of general circulation published in this state.

History: En. Sec. 61, Ch. 286, L. 1959.

40-2817. Duration of suspension—insurer's obligations—reinstatement.

(1) Suspension of an insurer's certificate of authority shall be for such period as is fixed by the commissioner, in the order of suspension, but not to exceed one year. During the suspension the commissioner may shorten the period thereof by his further order.

(2) During the period of the suspension the insurer shall file its annual statement, pay fees, licenses and taxes as required under this code as if the certificate had continued in full force.

(3) Upon expiration of the suspension period (if within such period the certificate of authority has not been terminated) the insurer's certificate of authority shall automatically reinstate, unless the commissioner finds that the causes of the suspension have not been removed, or that the insurer is otherwise not in compliance with the requirements of this code, and of which the commissioner shall give the insurer notice not less than thirty (30) days in advance of the expiration of such period. If not so auto-

matically reinstated the certificate of authority shall be deemed to have expired as at the end of the suspension period or upon failure of the insurer to continue the certificate during the suspension period, whichever event shall first occur.

(4) Upon reinstatement of the insurer's certificate of authority, the authority of its agents in this state to represent the insurer shall likewise reinstate.

(5) The commissioner shall forthwith notify both the insurer and its agents in this state, as shown by his records, of such reinstatement.

History: En. Sec. 62, Ch. 286, L. 1959.

40-2818. Commissioner attorney for service of process. (1) Each insurer applying for authority to transact insurance in this state shall appoint the commissioner, and his successors in office, as its attorney to receive service of legal process issued against it in Montana. The appointment shall be made on a form as designated and furnished by the commissioner. The appointment shall be irrevocable, shall bind the insurer and any successor in interest or to the assets or liabilities of the insurer, and shall remain in effect as long as there is in force in Montana any contract made by the insurer or obligations arising therefrom.

(2) Service of such process against a foreign or alien insurer shall be made only by service of process upon the commissioner, or upon a deputy or other person in charge of his office during his absence. Service of process against a domestic insurer may be made either upon the commissioner or upon the insurer corporation in the manner provided by laws applying to corporations generally, or upon the insurer's attorney-in-fact if a domestic reciprocal insurer.

(3) Each insurer at time of application for a certificate of authority shall file with the commissioner designation of the name and address of the person to whom process against it served upon the commissioner is to be forwarded. The insurer may change such designation by a new filing.

History: En. Sec. 63, Ch. 286, L. 1959.

Cross-Reference

Application of Montana Rules of Civil Procedure to service on foreign insurers, sec. 93-2711-7.

Collateral References

Insurance 26, 627.

44 C.J.S. Insurance § 84; 46 C.J.S. Insurance § 1270.

23 Am. Jur. 526, Foreign Corporations, §§ 505 et seq.

Cessation by foreign corporation of business within state as affecting designation

of agent for service of process. 45 ALR 1447.

Service by mail or service upon, or acknowledgment of service by, deputy or other subordinate of the public officer named in statute providing for service of process in action against foreign corporation. 98 ALR 1437.

Who, other than public official, may be served with process in action against foreign corporation doing business in state. 113 ALR 9, 100.

Foreign insurance company as subject to service of process in action on policy. 44 ALR 2d 416.

DECISIONS UNDER FORMER LAW

Failure to Appoint Attorney

Service upon insurance commissioner was invalid service upon foreign surety company, where it did not appoint commissioner its attorney for that purpose. *Ulmen v. National Surety Co.*, 4 F Supp 194.

Mutual Benefit Associations

Under former section 40-2118, foreign mutual benefit associations could be sued in the courts of Montana; the object of the section in requiring the appointment of an agent in the state upon whom service of process may be made was to provide for

the collection of debts due from them to its citizens and to enforce the contracts made in the state through their agents.

Reed v. Woodmen Of The World, 94 M 374, 383, 22 P 2d 819.

40-2819. Serving process—time to plead. (1) Duplicate copies of legal process against an insurer for whom the commissioner is attorney pursuant to section 40-2818, shall be served upon the commissioner, or upon his deputy or other person in charge of his office during his absence. At the time of service the plaintiff shall pay to the commissioner three dollars (\$3), taxable as costs in the action. Upon receiving such service the commissioner shall promptly forward a copy thereof by certified or registered mail to the person last so designated by the insurer to receive the same.

(2) Where process is served upon the commissioner as an insurer's attorney, the insurer shall have thirty (30) days within which to appear, answer, or plead after date of mailing of the copy thereof by the commissioner, exclusive of date of mailing, as provided by subsection (1).

(3) Process served upon the commissioner and copy thereof forwarded as in this section provided shall constitute service thereof upon the insurer.

History: En. Sec. 64, Ch. 286, L. 1959.

Collateral References

Constitutionality, construction and effect of statute providing for service of process upon statutory agent in action against foreign corporation as regards communications to corporation of fact of service. 89 ALR 658.

Service by mail or service upon, or acknowledgment of service by, deputy or other subordinate of the public officer named in statute providing for service of process in action against foreign corporation. 98 ALR 1437.

40-2820. Annual statement. (1) Each authorized insurer shall annually on or before March 1 file with the commissioner a full and true statement of its financial condition, transactions, and affairs as of the December 31 preceding. The statement shall be in such general form and context as is required or not disapproved by the commissioner, and as is in current use for similar reports to states in general with respect to the type of insurer and kinds of insurance to be reported upon, and as supplemented for additional information required by the commissioner. The statement shall be verified by the oath of the insurer's president or vice-president, and secretary, or, if a reciprocal insurer, by the oath of the attorney-in-fact or its like officers if a corporation. The commissioner may, in his discretion, waive any such verification under oath.

(2) The statement of an alien insurer shall relate only to its transactions and affairs in the United States unless the commissioner requires otherwise. If the commissioner requires a statement as to an alien insurer's affairs throughout the world, the insurer shall file such statement with the commissioner as soon as reasonably possible. The statement shall be verified by the insurer's United States manager or other officer duly authorized.

(3) The commissioner may refuse to accept fee for continuance of the insurer's certificate of authority, as provided in section 40-2813, or may in his discretion suspend or revoke the certificate of authority of any insurer failing to file its annual statement when due.

(4) At time of filing, the insurer shall pay to the commissioner the fee for filing its statement as prescribed in section 40-2726.

History: En. Sec. 65, Ch. 286, L. 1959.

Collateral References

Insurance—9.

44 C.J.S. Insurance § 73.

29 Am. Jur. 472, Insurance, § 55.

40-2821. Tax. (1) Each authorized insurer, and each formerly authorized insurer with respect to premiums so received while an authorized insurer in this state, shall file with the commissioner, on or before March 1 each year, a report (except as to wet marine and transportation insurance taxed under subsection (3) below) in form as prescribed by the commissioner showing total direct premium income including policy, membership and other fees, premiums paid by application of dividends, refunds, savings, savings coupons, and similar returns or credits to payment of premiums for new or additional or extended or renewed insurance, charges for payment of premium in installments, and all other consideration for insurance from all kinds and classes of insurance whether designated as a premium or otherwise, received by it during the preceding calendar year on account of policies covering property, subjects, or risks located, resident, or to be performed in Montana (with proper proportionate allocation of premium as to such property, subjects, or risks in Montana insured under policies or contracts covering property, subjects, or risks located or resident in more than one state), after deducting from such total direct premium income applicable cancellations, returned premiums, the unabsorbed portion of any deposit premium, the amount of reduction in or refund of premiums allowed to industrial life policyholders for payment of premiums direct to an office of the insurer, all policy dividends, refunds, savings, savings coupons and other similar returns paid or credited to policyholders with respect to such policies. As to title insurance "premium" includes only the risk portion of the charge for such insurance. No deduction shall be made of the cash surrender values of policies. Considerations received on annuity contracts shall not be included in total direct premium income and shall not be subject to tax.

(2) Coincident with the filing of the tax report referred to in subsection (1) above, each such insurer shall pay to the commissioner a tax upon such net premiums, the tax to be computed at the rate of two per cent of such premiums; provided that for each of the calendar years 1961 and 1962 the tax shall be computed at the rate of two and one-quarter per cent of such premiums.

Provided, that where any insurer has not less than fifty per cent of its paid-in capital stock invested in Montana securities, the insurer shall be allowed to deduct whatever tax it may have already paid to the state of Montana and its political subdivisions, during the same calendar year as to which premium tax is being paid, from the amount otherwise due under this section. For the purpose of this provision "paid-in capital stock" as to a mutual or reciprocal insurer shall be deemed to be an amount equal to ten per cent of the insurer's assets; and "Montana securities" shall be deemed to include only general obligations of the state of Montana or of its political subdivisions, mortgage loans secured by a first lien upon real

estate located in Montana, and real estate located in Montana owned by the insurer, all if otherwise lawful investments of the insurer under this code.

(3) (a) On or before March 1 of each year each insurer shall file with the commissioner, on forms as prescribed and furnished or accepted by him, a report of its gross underwriting profit on wet marine and transportation insurance, as defined in section 40-2907, written in this state during the calendar year next preceding, and shall at the same time pay to the commissioner a tax of three-quarters of one per cent of such gross underwriting profit.

(b) Such gross underwriting profit shall be ascertained by deducting from the net premiums (i.e. gross premiums less all return premiums and premiums for reinsurance) on such wet marine and transportation insurance contracts the net losses paid (i.e. gross losses paid less salvage and recoveries on reinsurance ceded) during such calendar year under such contracts. In the case of insurers issuing participating contracts, such gross underwriting profit shall not include for computation of the tax prescribed by this subsection (3) the amounts refunded, credited or paid as participation dividends or savings by such insurers to the holders of such contracts.

(4) That portion of the tax paid hereunder by an insurer on account of premiums received for fire insurance shall be separately specified in the report as required by the commissioner, for apportionment as provided by law. Where insurance against fire is included with insurance of property against other perils at an undivided premium, the insurer shall make such reasonable allocation from such entire premium to the fire portion of the coverage as shall be stated in such report and as may be approved or accepted by the commissioner.

(5) With respect to authorized insurers the premium tax provided by this section shall be payment in full and in lieu of all other demands for any and all state, county, city, district, municipal, and school taxes, licenses, fees and excises of whatever kind or character, excepting only those prescribed by this code, taxes on real and tangible personal property located in this state and taxes payable under section 82-1231, Revised Codes of Montana, 1947 (tax for support of state fire marshal activities), and demands for state, county, city, district, municipal, and school taxes, licenses, fees, and excises made because of operations prior to January 1, 1957.

(6) The state of Montana hereby pre-empt the field of imposing excise, privilege, franchise, income, license, and similar taxes, licenses, and fees upon insurers and their general agents and agents as such, and on the intangible property of insurers or such agents; and no county, city, municipality, district, school district, or other political subdivision or agency in Montana shall levy upon insurers, or upon their general agents and agents as such, any such tax, license, or fee additional to such as are levied by the legislative assembly of Montana in this code.

(7) The commissioner may suspend or revoke the certificate of authority of any insurer which fails to pay its taxes as required under this section.

(8) The provisions of this section shall apply to taxable years beginning after December 31, 1960.

History: En. Sec. 66, Ch. 286, L. 1959; amd. Sec. 1, Ch. 160, L. 1961.

Cross-Reference

Taxation of insurance companies, secs. 84-5101 to 84-5103.

Collateral References

Insurance 7, 20.

44 C.J.S. Insurance §§ 71, 80.

33 Am. Jur. 389, Licenses, §§ 75 et seq.

Failure to procure license or permit as affecting validity or enforceability of contract. 30 ALR 834, 866.

DECISIONS UNDER FORMER LAW

Additional Tax

Former section 40-1302 was not repealed by sections 84-1501 to 84-1519, imposing a further license fee of one per cent upon the net income of corporations. *Equitable Life Assur. Co. v. Hart*, 55 M 76, 86, 88, 173 P 1062.

The license fee required of insurance corporations by former section 40-1302 and that exacted by sections 84-1501 et seq. did not constitute double taxation, the impositions, though upon the same persons, not being for the same thing. *Equitable Life Assur. Co. v. Hart*, 55 M 76, 86, 173 P 1062.

Annuities Are Insurance

Fact that former section 40-1302 made no distinction between premiums collected for ordinary life insurance policies and those collected for annuities and consequently life insurance companies were

charged a license fee based upon total of such premiums indicated that annuities constituted life insurance. In re *Fligman's Estate*, 113 M 505, 507, 129 P 2d 627.

Revocation of License

An order by the commissioner of insurance to an insurance company to show cause why its license to do business in the state should not be revoked for the reason, among others, that it had not paid the license fee required by former law, on particular premiums set forth in the order, was sufficient to confer jurisdiction upon him to hear the matter, as against the contention that as a basis to issue an order to show cause why a company's license should not be canceled, the commissioner must find some of the violations enumerated in former section 40-1106. *State ex rel. Pearl Assurance Co. v. Holmes*, 113 M 144, 147. 124 P 2d 700.

40-2822. Resident agent required—countersignature—records—exceptions. (1) No authorized insurer shall issue a policy covering a subject of insurance resident, located, or to be performed in Montana unless the policy is written through a licensed agent resident in Montana of the insurer, nor unless the policy or countersignature endorsement attached thereto is countersigned by such agent.

(2) No such countersignature shall be made in blank.. The agent may by express written authorization given in advance delegate to his salaried clerical employee the power to so countersign in the name of the agent such contracts or classes of contracts as are designated in such authorization, so long as the initials of such employee are written below the agent's name on such countersignature; but the agent shall not thereby delegate, or have power to delegate, to any other person the power or authority to bind an insurer with respect to any risk not already bound by the agent or other person having clear authority from the insurer so to bind. The agent shall be responsible for all of the acts of such employee within the scope of the authority so delegated. The agent shall keep a record of each and all coverages countersigned by him or by his authority.

(3) This section shall not apply to:

(a) Reinsurance.

(b) Life insurance, disability insurance or annuity contracts.

(c) Insurance of the rolling stock, vessels or aircraft of any common

carrier in interstate or foreign commerce, or of any vehicle principally garaged and used in another state, or covering any liability or other risks incident to the ownership, maintenance or operation thereof.

(d) Insurance of property in course of transportation interstate or in foreign trade, or any liability or risk incident thereto.

(e) Insurance of wet marine and transportation risks.

(f) With respect to countersignature to policies issued through agents compensated only by salary or issued by insurers not using agents in the general solicitation of business.

(4) Violation of this section shall not invalidate any contract otherwise valid as between the insurer and the insured.

History: En. Sec. 67, Ch. 286, L. 1959.

Collateral References

Insurance 22.

44 C.J.S. Insurance §§ 85, 256.

Stipulated period of time coverage of insurance policy as affected by countersigning subsequent to specified commencement date. 22 ALR 2d 984.

40-2823. Salaried personnel cannot countersign—exception for emergencies. (1) With respect to policies subject to countersignature requirements under section 40-2822, only a licensed agent of the insurer resident in Montana, whose compensation as such agent is by commission computed as a percentage of the premium received on each such policy written, shall have power to countersign as required by section 40-2822.

(2) No branch manager, state agent, special agent, general or any other like supervisory agent or any other representative of the insurer, whose compensation therefrom is in whole or in part by salary, shall have power to countersign such policies or countersignature endorsements thereto; except, that in an emergency where it is necessary that an insurance policy be issued without delay and no resident agent of the insurer having power to execute the policy is then reasonably available, then any other individual having authority therefor from the insurer may execute such policy in the first instance in order to make a contract between the insurer and the obligee or the insured, if such policy is subsequently countersigned in fact by such a resident agent.

History: En. Sec. 68, Ch. 286, L. 1959.

40-2824. Policies originating outside state, commission of resident agent.

(1) As to policies or endorsements thereto which are subject to countersignature requirements under section 40-2822 contracted for or otherwise originating outside the boundaries of Montana, there shall be payable to the countersigning agent, resident in Montana, a commission which shall not be less than five per cent (5%) of the premium charged and received, but not to exceed fifty per cent (50%) of the commission paid by the insurer, so that a record within Montana will be kept of such business and that the state may better receive any tax required by law to be paid with respect to such insurance. If, however, the originating agent or broker, or the insurer, desires additional service to be rendered during the term of the policy, then the compensation for such countersigning resident agent shall be in such additional amount as is fixed by mutual agreement of such parties in interest.

(2) Except, that if pursuant to the laws of another state the countersigning agents of that state retain as commission or compensation with respect to business originated by Montana agents more than five per cent (5%) of the premium, then Montana agents who countersign policies representing business originated by agents or brokers of such other state shall charge and receive a commission in amount not less than that so received by countersigning agents of the other state.

History: En. Sec. 69, Ch. 286, L. 1959.

DECISIONS UNDER FORMER LAW

Constitutionality

The requirement of Ch. 95, Laws 1937, that insurance companies pay to resident agents the "full" commission on policies issued on risks in the state, prohibiting payment of a portion thereof to nonresident agents and brokers and authorizing revocation of the certificate of authority

issued to an insurance company which failed to comply therewith, denied "due process" and "equal protection of the laws." *Springfield Fire & Marine Ins. Co. v. Holmes*, 32 F Supp 964, 988. Reversed without opinion in *Holmes v. Springfield Fire & Marine Ins. Co.*, 311 U S 606, 85 L Ed 384, 61 S Ct 19.

40-2825. Policies issued at home or branch offices. Nothing in sections 40-2822 through 40-2824 shall prevent any insurer from issuing any policy, as to which the resident agent or countersignature requirement of section 40-2822 is applicable, at its home or branch office, but such policies shall be subsequently countersigned, where otherwise required, by its agent resident in Montana and the insurer's licensed agent resident in Montana shall receive the commission on such policy when the premium is paid. This section does not apply as to life insurance.

History: En. Sec. 70, Ch. 286, L. 1959.

40-2826. Retaliation. (1) When by or pursuant to the laws of any other state or foreign country any taxes, licenses and other fees, in the aggregate, and any fines, penalties, deposit requirements or other material obligations, prohibitions or restrictions are or would be imposed upon Montana insurers, or upon the agents or representatives of such insurers, which are in excess of such taxes, licenses and other fees, in the aggregate, or which are in excess of the fines, penalties, deposit requirements or other obligations, prohibitions, or restrictions directly imposed upon similar insurers, or upon the agents or representatives of such insurers, of such other state or country under the statutes of this state, so long as such laws of such other state or country continue in force or are so applied, the same taxes, licenses and other fees, in the aggregate, or fines, penalties or deposit requirements or other material obligations, prohibitions, or restrictions of whatever kind shall be imposed by the commissioner upon the insurers, or upon the agents or representatives of such insurers, of such other state or country doing business or seeking to do business in Montana. Any tax, license or other fee or other obligation imposed by any city, county, or other political subdivision or agency of such other state or country on Montana insurers or their agents or representatives shall be deemed to be imposed by such state or country within the meaning of this section.

(2) This section shall not apply as to personal income taxes, nor as to ad valorem taxes on real or personal property nor as to special purpose

obligations or assessments imposed by another state in connection with particular kinds of insurance other than property insurance; except that deductions, from premium taxes or other taxes otherwise payable, allowed on account of real estate or personal property taxes paid shall be taken into consideration by the commissioner in determining the propriety and extent of retaliatory action under this section.

(3) For the purposes of this section the domicile of an alien insurer, other than insurers formed under the laws of Canada, shall be that state designated by the insurer in writing filed with the commissioner at time of admission to this state or within six (6) months after the effective date of this code, whichever date is the later, and may be any one of the following states:

- (a) That in which the insurer was first authorized to transact insurance;
- (b) That in which is located the insurer's principal place of business in the United States;
- (c) That in which is held the larger deposit of trusteed assets of the insurer for the protection of its policyholders and creditors in the United States.

If the insurer makes no such designation its domicile shall be deemed to be that state in which is located its principal place of business in the United States.

History: En. Sec. 71, Ch. 286, L. 1959.

Collateral References

Insurance—19.

44 C.J.S. Insurance § 76.

29 Am. Jur. 490, Insurance, §§ 71, 72.

Discrimination by state against foreign corporations in imposition of taxes and license fees. 49 ALR 726.

Constitutionality, construction, and effect of retaliatory statutes. 91 ALR 795.

DECISIONS UNDER FORMER LAW

Constitutional Provision

The purpose of Sec. 11, Art XV of the Constitution, is to prevent the granting of any rights or immunities to foreign corporations not enjoyed by corporations of the same or similar kind created under the laws of and doing business in Montana, and has no application to a case where a foreign corporation sues to recover a refund of taxes illegally exacted and paid under protest. *Occidental Life Ins. Co. v. Holmes*, 107 M 48, 61, 80 P 2d 383.

Form of Burdens in Foreign State

The purpose of a former "retaliatory statute" was to place on such corporations the same total burden for doing business in Montana that the states where such corporations have their domicile

would impose upon a Montana corporation doing a like business there, and to arrive at a fair and equitable adjustment and to give the statute such an effect, the total exactions must be taken into account, irrespective of how they may be characterized or named. *Occidental Life Ins. Co. v. Holmes*, 107 M 48, 51, 80 P 2d 383.

Lesser Burden in Foreign State

Where the law of a foreign insurer's domicile imposed a lesser burden upon an outside life insurance corporation, by deducting the real estate tax from the ultimate amount due, a former retaliation statute had no application. *Occidental Life Ins. Co. v. Holmes*, 107 M 48, 51, 80 P 2d 383.

CHAPTER 29

KINDS OF INSURANCE—LIMITS OF RISK—REINSURANCE

- Section 40-2901. Definitions not mutually exclusive.
 40-2902. "Life insurance" defined.
 40-2903. "Disability insurance" defined.

- 40-2904. "Property insurance" defined.
- 40-2905. "Casualty insurance" defined.
- 40-2906. "Surety insurance" defined.
- 40-2907. "Marine," "wet marine and transportation" insurance defined.
- 40-2908. "Title insurance" defined.
- 40-2909. Limit of risk.
- 40-2910. Reinsurance.

40-2901. Definitions not mutually exclusive. It is intended that certain insurance coverages may come within the definitions of two or more kinds of insurance as defined in this chapter, and the inclusion of such coverage within one definition shall not exclude it as to any other kind of insurance within the definition of which such coverage may likewise be reasonably included.

History: En. Sec. 72, Ch. 286, L. 1959.

Collateral References

Insurance 124-126.

44 C.J.S. Insurance §§ 1-48.

29 Am. Jur. 436, Insurance, §§ 5-18.

40-2902. "Life insurance" defined. Life insurance is insurance on human lives. The transaction of life insurance includes also the granting of endowment benefits, additional benefits in event of death or dismemberment by accident or accidental means, additional benefits in event of the insured's disability, and optional modes of settlement of proceeds of life insurance. Transaction of life insurance does not include workmen's compensation insurance.

History: En. Sec. 73, Ch. 286, L. 1959.

DECISIONS UNDER FORMER LAW

Annuities

Subdivision 2 of former section 40-1301 indicated that annuity contracts were in-

surance. In re Fligman's Estate, 113 M 505, 507, 129 P 2d 627.

40-2903. "Disability insurance" defined. Disability insurance is insurance of human beings against bodily injury, disablement, or death by accident or accidental means, or the expense thereof, or against disablement or expense resulting from sickness, and every insurance appertaining thereto. Transaction of disability insurance does not include workmen's compensation insurance.

History: En. Sec. 74, Ch. 286, L. 1959.

40-2904. "Property insurance" defined. Property insurance is insurance on real or personal property of every kind and of every interest therein, whether on land, water, or in the air, against loss or damage from any and all hazard or cause, and against loss consequential upon such loss or damage, other than noncontractual legal liability for any such loss or damage.

History: En. Sec. 75, Ch. 286, L. 1959.

Damage from sonic boom as within property insurance policy. 74 ALR 2d 754.

Collateral References

Construction of hail insurance. 4 ALR 1298.

40-2905. "Casualty insurance" defined. (1) Casualty insurance includes: (a) Vehicle insurance. Insurance against loss of or damage to any land vehicle or aircraft or any draft or riding animal or to property while contained therein or thereon or being loaded or unloaded therein or therefrom, from any hazard or cause, and against any loss, liability or expense resulting from or incidental to ownership, maintenance or use of any such vehicle, aircraft or animal; together with insurance against accidental death or accidental injury to individuals, including the named insured, while in, entering, alighting from, adjusting, repairing, cranking, or caused by being struck by a vehicle, aircraft or draft or riding animal, if such insurance is issued as an incidental part of insurance on the vehicle, aircraft or draft or riding animal.

(b) Liability insurance. Insurance against legal liability for the death, injury, or disability of any human being, or for damage to property; and provision of medical, hospital, surgical, disability benefits to injured persons and funeral and death benefits to dependents, beneficiaries or personal representatives of persons killed, irrespective of legal liability of the insured, when issued as an incidental coverage with or supplemental to liability insurance.

(c) Workmen's compensation and employer's liability. Insurance of the obligations accepted by, imposed upon, or assumed by employers under law for death, disablement, or injury of employees.

(d) Burglary and theft. Insurance against loss or damage by burglary, theft, larceny, robbery, forgery, fraud, vandalism, malicious mischief, confiscation, or wrongful conversion, disposal, or concealment, or from any attempt at any of the foregoing; including supplemental coverage for medical, hospital, surgical, and funeral expense incurred by the named insured or any other person as a result of bodily injury during the commission of a burglary, robbery, or theft by another; also insurance against loss of or damage to moneys, coins, bullion, securities, notes, drafts, acceptances, or any other valuable papers and documents, resulting from any cause.

(e) Personal property floater. Insurance upon personal effects against loss or damage from any cause under a personal property floater.

(f) Glass. Insurance against loss or damage to glass, including its lettering, ornamentation, and fittings.

(g) Boiler and machinery. Insurance against any liability and loss or damage to property or interest resulting from accident to or explosions of boilers, pipes, pressure containers, machinery, or apparatus, and to make inspection of and issue certificates of inspection upon boilers, machinery, and apparatus of any kind, whether or not insured.

(h) Leakage and fire extinguishing equipment. Insurance against loss or damage to any property or interest caused by the breakage or leakage of sprinklers, hoses, pumps, and other fire extinguishing equipment or apparatus, water pipes or containers, or by water entering through leaks or openings in buildings, and insurance against loss or damage to such sprinklers, hoses, pumps, and other fire extinguishing equipment or apparatus.

(i) Credit. Insurance against loss or damage resulting from failure of debtors to pay their obligations to the insured.

(j) Malpractice. Insurance against legal liability of the insured, and against loss, damage, or expense incidental to a claim of such liability, and including medical, hospital, surgical, and funeral benefits to injured persons, irrespective of legal liability of the insured, arising out of the death, injury, or disablement of any person, or arising out of damage to the economic interest of any person, as the result of negligence in rendering expert, fiduciary, or professional service.

(k) Elevator. Insurance against loss of or damage to any property of the insured, resulting from the ownership, maintenance or use of elevators, except loss or damage by fire, and to make inspection of and issue certificates of inspection upon, elevators.

(l) Livestock. Insurance against loss or damage to livestock, and services of a veterinary for such animals.

(m) Entertainments. Insurance indemnifying the producer of any motion picture, television, radio, theatrical, sport, spectacle, entertainment, or similar production, event, or exhibition against loss from interruption, postponement, or cancellation thereof due to death, accidental injury, or sickness of performers, participants, directors, or other principals.

(n) Miscellaneous. Insurance against any other kind of loss, damage, or liability properly a subject of insurance and not within any other kind of insurance as defined in this chapter, if such insurance is not disapproved by the commissioner as being contrary to law or public policy.

(2) Provision of medical, hospital, surgical, and funeral benefits, and of coverage against accidental death or injury, as incidental to and part of other insurance as stated under subdivisions (a) (vehicle), (b) (liability), (d) (burglary), and (j) (malpractice) of subsection (1) shall for all purposes be deemed to be the same kind of insurance to which it is so incidental, and shall not be subject to provisions of this code applicable to life or disability insurances.

History: En. Sec. 76, Ch. 286, L. 1959.

40-2906. "Surety insurance" defined. Surety insurance includes:

(1) Fidelity insurance, which is insurance guaranteeing the fidelity of persons holding positions of public or private trust.

(2) Insurance guaranteeing the performance of contracts, other than insurance policies, and guaranteeing and executing bonds, undertakings, and contracts of suretyship.

(3) Insurance indemnifying banks, bankers, brokers, financial or moneyed corporations or associations against check forgery or alteration, or against loss, resulting from any cause, of bills of exchange, notes, bonds, securities, evidences of debt, deeds, mortgages, warehouse receipts or other valuable papers, documents, money, precious metals and articles made therefrom, jewelry, watches, necklaces, bracelets, gems, precious and semiprecious stones, including any loss while the same are being transported in armored motor vehicles, by mail, or by messenger, but not including any other risks of transportation or navigation; also insurance against

loss or damage to such an insured's premises or to his furnishings, fixtures, equipment, safes, and vaults therein, caused by burglary, robbery, theft, vandalism or malicious mischief, or any attempt thereat.

History: En. Sec. 77, Ch. 286, L. 1959.

40-2907. "Marine," "wet marine and transportation" insurance defined.

(1) "Marine insurance" includes:

(a) Insurance against any and all kinds of loss or damage to:

(i) Vessels, craft, aircraft, cars, automobiles and vehicles of every kind, as well as all goods, freights, cargoes, merchandise, effects, disbursements, profits, moneys, bullion, precious stones, securities, choses in action, evidences of debt, valuable papers, bottomry and respondentia interests and all other kinds of property and interests therein, in respect to, appertaining to or in connection with any and all risks or perils of navigation, transit, or transportation, including war risks, on or under any seas or other waters, on land or in the air, or while being assembled, packed, crated, baled, compressed or similarly prepared for shipment or while awaiting the same or during any delays, storage, transshipment, or reshipment incident thereto, including marine builder's risks and all personal property floater risks, and

(ii) Person or to property in connection with or appertaining to a marine, inland marine, transit or transportation insurance, including liability for loss of or damage to either, arising out of or in connection with the construction, repair, operation, maintenance or use of the subject matter of such insurance (but not including life insurance or surety bonds nor insurance against loss by reason of bodily injury to the person arising out of the ownership, maintenance or use of automobiles), and

(iii) Precious stones, jewels, jewelry, gold, silver and other precious metals, whether used in business or trade or otherwise and whether the same be in course of transportation or otherwise, and

(iv) Bridges, tunnels and other instrumentalities of transportation and communication (excluding buildings, their furniture and furnishings, fixed contents and supplies held in storage) unless fire, tornado, sprinkler leakage, hail, explosion, earthquake, riot and/or civil commotion are the only hazards to be covered; piers, wharves, docks and slips, excluding the risks of fire, tornado, sprinkler leakage, hail, explosion, earthquake, riot and/or civil commotion; other aids to navigation and transportation, including dry docks and marine railways, against all risks.

(b) "Marine protection and indemnity insurance," meaning insurance against, or against legal liability of the insured for, loss, damage or expense arising out of, or incident to, the ownership, operation, chartering, maintenance, use, repair or construction of any vessel, craft or instrumentality in use in ocean or inland waterways, including liability of the insured for personal injury, illness or death or for loss of or damage to the property of another person.

(2) For the purposes of this code "wet marine and transportation" insurance is that part of marine insurance which includes only:

(a) Insurance upon vessels, crafts, hulls and of interests therein or with relation thereto;

(b) Insurance of marine builder's risks, marine war risks and contracts of marine protection and indemnity insurance;

(c) Insurance of freights and disbursements pertaining to a subject of insurance coming within this subsection; and

(d) Insurance of personal property and interests therein, in course of exportation from or importation into any country, and in course of transportation coastwise or on inland waters, including transportation by land, water, or air from point of origin to final destination, in respect to, appertaining to or in connection with, any and all risks or perils of navigation, transit or transportation, and while being prepared for and while awaiting shipment, and during any delays, storage, transshipment or reshipment incident thereto.

History: En. Sec. 78, Ch. 286, L. 1959.

40-2908. "Title insurance" defined. Title insurance is insurance of owners of property or others having an interest therein, or liens or encumbrances thereon, against loss by encumbrance, or defective titles, or invalidity, or adverse claim to title.

History: En. Sec. 79, Ch. 286, L. 1959.

Collateral References

Absence of effectual subdivision, or of street or easement, as within title insurance coverage. 40 ALR 2d 1247.

Coverage of "non-recording" or "non-

filing" insurance against loss from failure to record chattel mortgage, conditional sale, or other security instrument. 51 ALR 2d 325.

Measure, extent, or amount of recovery on policy of title insurance. 60 ALR 2d 972.

40-2909. Limit of risk. (1) No insurer shall retain any risk on any one subject of insurance, whether located or to be performed in this state or elsewhere, in an amount exceeding ten per cent (10%) of its surplus to policyholders.

(2) A "subject of insurance" for the purposes of this section, as to insurance against fire and hazards other than windstorm, earthquake, or other catastrophe hazards, includes all properties insured by the same insurer which are customarily considered by underwriters to be subject to loss or damage from the same fire or the same occurrence of such other hazard insured against.

(3) Reinsurance ceded as authorized by section 40-2910 shall be deducted in determining risk retained. As to surety risks, deduction shall also be made of the amount assumed by any established incorporated co-surety and the value of any security deposited, pledged, or held subject to the surety's consent and for the surety's protection.

(4) As to alien insurers, this section shall relate only to risks and surplus to policyholders of the insurer's United States branch.

(5) "Surplus to policyholders" for the purposes of this section, in addition to the insurer's capital and surplus shall be deemed to include any voluntary reserves which are not required pursuant to law, and shall be determined from the last sworn statement of the insurer on file with the commissioner, or by the last report of examination of the insurer, whichever is the more recent at time of assumption of risk.

(6) This section shall not apply to life or disability insurance, title insurance, insurance of wet marine and transportation risks, workmen's

compensation insurance, employer's liability coverages, sprinklered risks. nor to any policy or type of coverage as to which the maximum possible loss to the insurer is not readily ascertainable on issuance of the policy.

History: En. Sec. 80, Ch. 286, L. 1959.

40-2910. Reinsurance. (1) An insurer may accept reinsurance only of such kinds of risks, and retain risk thereon within such limits, as it is otherwise authorized to insure.

(2) An insurer may reinsure all or part of any particular risk with any solvent insurer authorized to transact insurance in one or more states and having surplus to policyholders in amount not less than the paid-in capital stock required of a domestic stock insurer transacting like kinds of insurance.

(3) No credit shall be allowed to an insurer, as an asset or as a deduction from liability, for reinsurance ceded to an alien insurer unless such alien insurer has surplus to policyholders in amount not less than the paid-in capital stock required of a domestic stock insurer transacting like kinds of insurance and is either (a) authorized to transact insurance in at least one state of the United States, or (b) has an attorney-in-fact resident in the United States upon whom service of legal process may be made.

(4) Credit shall be allowed as an asset or as a deduction from liability, to any ceding insurer for reinsurance ceded to an assuming insurer qualified therefor under the foregoing provisions of this section; except that no such credit shall be allowed unless the reinsurance is payable by the assuming insurer on the basis of the liability of the ceding insurer under the contracts reinsured without diminution because of the insolvency of the ceding insurer.

(5) Upon request of the commissioner an insurer shall promptly inform the commissioner in writing of the cancellation or any other material change of any of its reinsurance treaties or arrangements.

(6) This section shall not apply to wet marine and transportation insurance.

History: En. Sec. 81, Ch. 286, L. 1959.

Collateral References

Insurance 676-686.

46 C.J.S. Insurance §§ 1220-1224.

29A Am. Jur. 823, Insurance, §§ 1747 et seq.

Right of reinsurer to question the insurable interest or eligibility of beneficiary. 18 ALR 1163.

Effect of reinsurance of life policy as modifying the amount of liability upon death of insured. 25 ALR 1535.

Reinsurance by foreign insurance corporation as doing business within state. 137 ALR 1141.

CHAPTER 30

ASSETS AND LIABILITIES

- Section 40-3001. "Assets" defined.
 40-3002. Assets as deductions from liabilities.
 40-3003. Assets not allowed.
 40-3004. Liabilities, in general.
 40-3005. Unearned premium reserve.
 40-3006. Unearned premium reserve for marine and transportation insurance.
 40-3007. Reserve for disability insurance.
 40-3008. Loss reserves, liability insurance and workmen's compensation.

- 40-3009. Increase of inadequate reserves.
- 40-3010. Title insurance reserves.
- 40-3011. Standard valuation law—life insurance.
- 40-3012. Deposit of reserves, domestic life insurers.
- 40-3013. Valuation of bonds.
- 40-3014. Valuation of other securities.
- 40-3015. Valuation of property.
- 40-3016. Valuation of purchase money mortgages.

40-3001. "Assets" defined. In any determination of the financial condition of an insurer, there shall be allowed as assets only such assets as are owned by the insurer and which consist of:

(1) Cash in the possession of the insurer, or in transit under its control, and including the true balance of any deposit in a solvent bank or trust company.

(2) Investments, securities, properties and loans acquired or held in accordance with this code, and in connection therewith the following items:

(a) Interest due or accrued on any bond or evidence of indebtedness which is not in default and which is not valued on a basis including accrued interest.

(b) Declared and unpaid dividends on stock and shares, unless such amount has otherwise been allowed as an asset.

(c) Interest due or accrued upon a collateral loan in an amount not to exceed one year's interest thereon.

(d) Interest due or accrued on deposits in solvent banks and trust companies, and interest due or accrued on other assets, if such interest is in the judgment of the commissioner a collectible asset.

(e) Interest due or accrued on a mortgage loan, in an amount not exceeding in any event the amount, if any, of the excess of the value of the property less delinquent taxes thereon over the unpaid principal; but in no event shall interest accrued for a period in excess of eighteen (18) months be allowed as an asset.

(f) Rent due or accrued on real property if such rent is not in arrears for more than three months, and rent more than three months in arrears if the payment of such rent be adequately secured by property held in the name of the tenant and conveyed to the insurer as collateral.

(g) The unaccrued portion of taxes paid prior to the due date on real property.

(3) Premium notes, policy loans, and other policy assets and liens on policies and certificates of life insurance and annuity contracts and accrued interest thereon, in an amount not exceeding the legal reserve and other policy liabilities carried on each individual policy.

(4) The net amount of uncollected and deferred premiums and annuity considerations in the case of a life insurer.

(5) Premiums in the course of collection, other than for life insurance, not more than three (3) months past due, less commissions payable thereon. The foregoing limitation shall not apply to premiums payable directly or indirectly by the United States government or by any of its instrumentalities.

(6) Installment premiums other than life insurance premiums to the extent of the unearned premium reserve carried on the policy to which premiums apply.

(7) Notes and like written obligations not past due, taken for premiums other than life insurance premiums, on policies permitted to be issued on such basis, to the extent of the unearned premium reserves carried thereon.

(8) The full amount of reinsurance recoverable by a ceding insurer from a solvent reinsurer and which reinsurance is authorized under section 40-2910.

(9) Amounts receivable by an assuming insurer representing funds withheld by a solvent ceding insurer under a reinsurance treaty.

(10) Deposits or equities recoverable from underwriting associations, syndicates and reinsurance funds, or from any suspended banking institution, to the extent deemed by the commissioner available for the payment of losses and claims and at values to be determined by him.

(11) Electronic data processing machines if the cost of each such machine is at least one hundred thousand dollars, which cost shall be amortized in full over a period of not to exceed ten calendar years.

(12) All assets, whether or not consistent with the provisions of this section, as may be allowed pursuant to the annual statement form approved by the commissioner for the kinds of insurance to be reported upon therein.

(13) Other assets, not inconsistent with the provisions of this section, deemed by the commissioner to be available for the payment of losses and claims, at values to be determined by him.

History: En. Sec. 82, Ch. 286, L. 1959.

40-3002. Assets as deductions from liabilities. Assets may be allowed as deductions from corresponding liabilities, and liabilities may be charged as deductions from assets, and deductions from assets may be charged as liabilities, in accordance with the form of annual statement applicable to the insurer as prescribed by the commissioner, or otherwise in his discretion.

History: En. Sec. 83, Ch. 286, L. 1959.

40-3003. Assets not allowed. In addition to assets impliedly excluded by the provisions of section 40-3001, the following expressly shall not be allowed as assets in any determination of the financial condition of an insurer:

(1) Good will, trade names and other like intangible assets.

(2) Advances to officers (other than policy loans) whether secured or not, and advances to employees, agents and other persons on personal security only.

(3) Stock of such insurer, owned by it, or any equity therein or loans secured thereby, or any proportionate interest in such stock acquired or held through the ownership by such insurer of an interest in another firm, corporation or business unit.

(4) Furniture, fixtures (other than electronic data processing machines authorized under section 40-3001 (11)), furnishings, safes, vehicles, libraries, stationery, literature and supplies, except in the case of title insurers such materials and plants as the insurer is expressly authorized to invest in under section 40-3132 and except, in the case of any insurer, such personal property as the insurer is permitted to hold pursuant to

chapter 31 of this title, or which is acquired through foreclosure of chattel mortgages acquired pursuant to section 40-3127, or which is reasonably necessary for the maintenance and operation of real estate lawfully acquired and held by the insurer other than real estate used by it for home office, branch office and similar purposes.

(5) The amount, if any, by which the aggregate book value of investments as carried in the ledger assets of the insurer exceeds the aggregate value thereof as determined under this code.

History: En. Sec. 84, Ch. 286, L. 1959.

40-3004. Liabilities, in general. In any determination of the financial condition of an insurer, capital stock and liabilities to be charged against its assets shall include:

(1) The amount of its capital stock outstanding, if any.

(2) The amount, estimated consistent with the provisions of this code, necessary to pay all of its unpaid losses and claims incurred on or prior to the date of statement, whether reported or unreported, together with the expenses of adjustment or settlement thereof.

(3) With reference to life and disability insurance and annuity contracts:

(a) The amount of reserves on life insurance policies and annuity contracts in force, valued according to the tables of mortality, rates of interest, and methods adopted pursuant to this code which are applicable thereto.

(b) Reserves for disability benefits, for both active and disabled lives.

(c) Reserves for accidental death benefits.

(d) Any additional reserves which may be required by the commissioner consistent with practice formulated or approved by the National Association of Insurance Commissioners, on account of such insurance.

(4) With reference to insurance other than specified in subsection (3) of this section, and other than title insurance, the amount of reserves equal to the unearned portions of the gross premiums charged on policies in force, computed in accordance with this chapter.

(5) Taxes, expenses and other obligations due or accrued at the date of the statement.

History: En. Sec. 85, Ch. 286, L. 1959.

40-3005. Unearned premium reserve. (1) As to insurance against loss or damage to property (except as provided in section 40-3006), and as to all general casualty insurance and surety insurance, every insurer shall maintain an unearned premium reserve on all policies in force.

(2) The commissioner may require that such reserves shall be equal to the unearned portions of the gross premiums in force after deducting applicable reinsurance in solvent insurers as computed on each respective risk from the policy's date of issue. If the commissioner does not so require, the portions of the gross premium in force, less applicable reinsurance in solvent insurers, to be held as an unearned premium reserve, shall be computed according to the following table:

Term for Which Policy Was Written	Reserve for Unearned Premium
1 year or less	1/2
2 years	1st year 3/4 2nd year 1/4
3 years	1st year 5/6 2nd year 1/2 3rd year 1/6
4 years	1st year 7/8 2nd year 5/8 3rd year 3/8 4th year 1/8
5 years	1st year 9/10 2nd year 7/10 3rd year 1/2 4th year 3/10 5th year 1/10
Over 5 years	pro rata

(3) In lieu of computation according to the foregoing table, the insurer at its option may compute all of such reserves on a monthly or more frequent pro rata basis.

(4) After adopting a method for computing such reserve, an insurer shall not change methods without approval of the commissioner.

(5) This section does not apply to title insurance.

History: En. Sec. 86, Ch. 286, L. 1959.

Collateral References

Insurance—37, 58.

44 C.J.S. Insurance §§ 102, 112.

29 Am. Jur. 472, Insurance, § 56.

40-3006. Unearned premium reserve for marine and transportation insurance. As to marine and transportation insurance, the entire amount of premiums on trip risks not terminated shall be deemed unearned; and the commissioner may require the insurer to carry a reserve equal to one hundred per cent (100%) of premiums on trip risks written during the month ended as of the date of statement.

History: En. Sec. 87, Ch. 286, L. 1959.

40-3007. Reserve for disability insurance. For all disability insurance policies the insurer shall maintain an active life reserve which shall place a sound value on its liabilities under such policies and be not less than the reserve according to appropriate standards set forth in regulations issued by the commissioner and, in no event, less in the aggregate than the pro rata gross unearned premiums for such policies.

History: En. Sec. 88, Ch. 286, L. 1959.

Collateral References

29 Am. Jur. 472, Insurance, § 56.

40-3008. Loss reserves, liability insurance and workmen's compensation. Where required in the form of annual statement required of the insurer, the reserve for outstanding losses under insurance against loss or damage from accident to or injuries suffered by an employee or other person and for which the insured is liable, shall be computed as follows:

(1) For all liability suits being defended under policies written more than:

(a) Ten (10) years prior to the date as of which the statement is made, \$1,500 for each suit.

(b) Five (5) or more and less than ten (10) years prior to the date as of which the statement is made, \$1,000 for each suit.

(c) Three (3) or more and less than five (5) years prior to the date as of which the statement is made, \$850 for each suit.

(2) For all liability policies written during the three (3) years immediately preceding the date as of which the statement is made, the reserve shall be sixty per cent (60%) of the earned liability premiums of each of such three (3) years less all losses and expense payments made under liability policies written in the corresponding years; but in any event, such reserve shall for the first of such three (3) years be not less than \$750 for each outstanding liability suit on such year's policies.

(3) For all workmen's compensation claims under policies written more than three (3) years prior to the date as of which the statement is made, the reserve shall be the present value at four per cent (4%) interest of the determined and the estimated future payments.

(4) For all workmen's compensation claims under policies written in the three (3) years immediately preceding the date as of which the statement is made, such reserve shall be sixty-five per cent (65%) of the earned compensation premiums of each of such three years, less all loss and loss expense payments made in connection with such claims under policies written in the corresponding years. But in any event in the case of the first year of any such three-year period, such reserve shall be not less than the present value at four per cent (4%) interest of the determined and the estimated unpaid compensation claims under policies written during such year.

History: En. Sec. 89, Ch. 286, L. 1959.

40-3009. Increase of inadequate reserves. If loss experience shows that an insurer's loss reserves, however computed or estimated, are inadequate, the commissioner shall require the insurer to maintain loss reserves in such increased amount as is needed to make them adequate.

History: En. Sec. 90, Ch. 286, L. 1959.

40-3010. Title insurance reserves. In addition to an adequate reserve as to outstanding losses as required under section 40-3004, a title insurer shall maintain a guaranty fund or unearned premium reserve of not less than an amount computed as follows:

(1) Ten per cent (10%) of the total amount of the risk premiums written in the calendar year for title insurance contracts shall be assigned originally to the reserve.

(2) During each of the twenty (20) years next following the year in which the title insurance contract was issued, the reserve applicable to the contract may be reduced by five per cent (5%) of the original amount of such reserve.

History: En. Sec. 91, Ch. 286, L. 1959.

40-3011. Standard valuation law—life insurance. (1) The commissioner shall annually value, or cause to be valued, the reserve liabilities (hereinafter called reserves) for all outstanding life insurance policies and annuity and pure endowment contracts of every life insurer doing business in this state, and may certify the amount of any such reserves, specifying the mortality table or tables, rate or rates of interest and methods (net level premium method or other) used in the calculation of such reserves. In calculating such reserves, he may use group methods and approximate averages for fractions of a year or otherwise. In the case of an alien insurer, such valuation shall be limited to its insurance transactions in the United States. For the purpose of making such valuation the commissioner may employ a competent actuary who shall be paid by the insurer for which the service is rendered; but a domestic insurer may make such valuation and it may be received by the commissioner upon satisfactory proof of its correctness. In lieu of the valuation of the reserves herein required of any foreign or alien insurer, the commissioner may accept any valuation made, or caused to be made, by the insurance supervisory official of any state or other jurisdiction when such valuation complies with the minimum standard herein provided and if the official of such state or jurisdiction accepts as sufficient and valid for all legal purposes the certificate of valuation of the commissioner when such certificate states the valuation to have been made in a specified manner according to which the aggregate reserves would be at least as large as if they had been computed in the manner prescribed by the law of that state or jurisdiction.

Any insurer which at any time shall have adopted any standard of valuation producing greater aggregate reserves than those calculated according to the minimum standard herein provided may, with the approval of the commissioner, adopt any lower standard of valuation, but not lower than the minimum herein provided.

(2) This subsection shall apply to only those policies and contracts issued prior to the operative date of section 40-3831 (the standard non-forfeiture law).

The minimum standard of valuation on all policies of domestic life insurers issued prior to January 1, 1922, shall be the American experience table of mortality and interest at three and one-half per cent ($3\frac{1}{2}\%$) per annum, with preliminary term insurance for the first policy year, and for policies of such insurers issued subsequent to December 31, 1921, shall be the American experience table of mortality with interest at three and one-half per cent ($3\frac{1}{2}\%$) per annum, with preliminary term insurance for the first policy year, except as follows: If the premium charged for term insurance under a limited payment life preliminary term policy providing for the payment of all premiums thereon in less than twenty (20) years from the date of the policy, or under an endowment preliminary term policy, exceeds that charged for life insurance under twenty (20) payment life preliminary term policies of the same insurer, the reserve thereon at the end of any year, including the first, shall not be less than the reserve on a twenty (20) payment life preliminary term policy issued in the same year and at the same age, together with an amount which shall be

equivalent to the accumulation of a net level premium reserve sufficient to provide for a pure endowment at the end of the premium payment period equal to the difference between the value at the end of such period of such a twenty (20) payment life preliminary term policy and the full net level premium reserve at such time of such a limited payment life or endowment policy.

Reserves for all such policies and contracts may be calculated, at the option of the insurer, according to any standards which produce greater aggregate reserves for all such policies and contracts than the minimum reserves required by this subsection.

(3) This subsection shall apply to only those policies and contracts issued on or after the operative date of section 40-3831 (the standard non-forfeiture law).

(a) The minimum standard for the valuation of all such policies and contracts shall be the commissioner's reserve valuation method defined in subdivision (b), three and one-half per cent (3½%) interest, and the following tables:

(i) For all ordinary policies of life insurance issued on the standard basis, excluding any disability and accidental death benefits in such policies—the commissioner's 1941 standard ordinary mortality table for such policies issued prior to the operative date of subsection (8-a) of section 40-3831 (the standard nonforfeiture law) as amended, and the commissioner's 1958 standard ordinary mortality table for such policies issued on or after such operative date; except, that for any category of such policies issued on female risks, modified net premiums and present values, referred to in subdivision (b), may be calculated, at the option of the insurer with the approval of the commissioner, according to an age younger than the actual age of the insured.

(ii) For all industrial life insurance policies issued on the standard basis, excluding any disability and accidental death benefits in such policies,—the 1941 standard industrial mortality table.

(iii) For individual annuity and pure endowment contracts, excluding any disability and accidental death benefits in such policies—the 1937 standard annuity mortality table or, at the option of the insurer, the annuity mortality table for 1949, ultimate, or any modification of either of these tables approved by the commissioner.

(iv) For group annuity and pure endowment contracts, excluding any disability and accidental death benefits in such policies—the group annuity mortality table for 1951, any modification of such table approved by the commissioner, or, at the option of the insurer, any of the tables or modifications of tables specified for individual annuity and pure endowment contracts.

(v) For total and permanent disability benefits in or supplementary to ordinary policies or contracts—for policies or contracts issued on or after January 1, 1966, the tables of period 2 disablement rates and the 1930 to 1950 termination rates of the 1952 disability study of the society of actuaries, with due regard to the type of benefit; for policies or contracts issued on or after January 1, 1961, and prior to January 1, 1966, either such

tables or, at the option of the insurer, the class (3) disability table (1926); and for policies issued prior to January 1, 1961, the class (3) disability table (1926). Any such table shall, for active lives, be combined with a mortality table permitted for calculating the reserves for life insurance policies.

(vi) For accidental death benefits in or supplementary to policies—for policies issued on or after January 1, 1966, the 1959 accidental death benefits table; for policies issued on or after January 1, 1961, and prior to January 1, 1966, either such table or, at the option of the insurer, the intercompany double indemnity mortality table; and for policies issued prior to January 1, 1961, the intercompany double indemnity mortality table. Either table shall be combined with a mortality table permitted for calculating the reserves for life insurance policies.

(vii) For group life insurance, life insurance issued on the substandard basis and other special benefits—such tables as may be approved by the commissioner.

(b) Reserves according to the commissioner's reserve valuation method, for the life insurance and endowment benefits of policies providing for a uniform amount of insurance and requiring the payment of uniform premiums shall be the excess, if any, of the present value, at the date of valuation, of such future guaranteed benefits provided for by such policies, over the then present value of any future modified net premiums therefor. The modified net premiums for any such policy shall be such uniform percentage of the respective contract premiums for such benefits that the present value, at the date of issue of the policy, of all such modified net premiums shall be equal to the sum of the then present value of such benefits provided for by the policy and the excess of (A) over (B), as follows:

(A) A net level annual premium equal to the present value, at the date of issue, of such benefits provided for after the first policy year, divided by the present value, at the date of issue of an annuity of one per annum payable on the first and each subsequent anniversary of such policy on which a premium falls due; provided, however, that such net level annual premium shall not exceed the net level annual premium on the nineteen year premium whole life plan for insurance of the same amount at an age one year higher than the age at issue of such policy.

(B) A net one year term premium for such benefits provided for in the first policy year.

Reserves according to the commissioner's reserve valuation method for (i) life insurance policies providing for a varying amount of insurance or requiring the payment of varying premiums, (ii) annuity and pure endowment contracts, (iii) disability and accidental death benefits in all policies and contracts, and (iv) all other benefits, except life insurance and endowment benefits in life insurance policies, shall be calculated by a method consistent with the principles of this subdivision (b), except that any extra premiums charged because of impairments or special hazards shall be disregarded in the determination of modified net premiums.

(c) In no event shall an insurer's aggregate reserves for all life insurance policies, excluding disability and accidental death benefits, be less

than the aggregate reserves calculated in accordance with the method set forth in subdivision (b) and the mortality table or tables and rate or rates of interest used in calculating nonforfeiture benefits for such policies.

(d) Reserves for any category of policies, contracts or benefits as established by the commissioner, may be calculated at the option of the insurer according to any standards which produce greater aggregate reserves for such category than those calculated according to the minimum standard herein provided, but the rate or rates of interest used shall not be higher than the corresponding rate or rates of interest used in calculating any nonforfeiture benefits provided for therein. Provided, however, that reserves for participating life insurance policies may, with the consent of the commissioner, be calculated according to a rate of interest lower than the rate of interest used in calculating the nonforfeiture benefits in such policies, with the further proviso that if such lower rate differs from the rate used in the calculation of the nonforfeiture benefits by more than one-half per cent ($\frac{1}{2}\%$) the insurer issuing such policies shall file with the commissioner a plan providing for such equitable increases, if any, in the cash surrender values and nonforfeiture benefits in such policies as the commissioner shall approve.

(e) Deficiency reserves. If the gross premium charged by any life insurer on any policy or contract is less than the net premium for the policy or contract according to the mortality table, rate of interest and method used in calculating the reserve thereon, there shall be maintained on such policy or contract a deficiency reserve in addition to all other reserves required by law. For each such policy or contract the deficiency reserve shall be the present value, according to such standard, of an annuity of the difference between such net premium and the premium charged for such policy or contract, running for the remainder of the premium-paying period.

History: En. Sec. 92, Ch. 286, L. 1959;
amd. Sec. 1, Ch. 61, L. 1961.

40-3012. Deposit of reserves, domestic life insurers. (1) Domestic life insurers shall deposit and maintain on deposit, in securities and assets, with depositaries and subject to conditions as provided for in chapter 32 of this title, an amount not less than the reserves on its outstanding life insurance policies, and annuity contracts, as valued under section 40-3011.

(2) Annually on or before April 1, the insurer shall so deposit any additional such securities required under subsection (1) and related to the increase of such reserves during the calendar year next preceding, as determined from the insurer's annual statement as at December 31 of such preceding year.

(3) A domestic stock life insurer may credit toward such deposit the amount of any other deposit of the insurer held under chapter 32 for the protection of its policyholders or of its policyholders and creditors.

(4) Deposits of the reserves of a domestic life insurer under this section shall consist of securities and assets acquired in accordance with chapter 31 of this title except as follows:

(a) Common stocks acquired under section 40-3116 and investment trust securities acquired under section 40-3120 shall be eligible for deposit only to the extent of fifty per cent of the value at which they are carried in the last financial statement on file with the commissioner or their cost if acquired since the date of the last statement on file.

(b) Securities acquired under section 40-3125 (miscellaneous investments) shall not be eligible for deposit.

(c) Only real estate acquired under section 40-3128 (1) shall be eligible for deposit, and in no case shall the value of such real estate for deposit purposes exceed the original cost.

(5) Real estate mortgage loans, chattel mortgage loans and policy loans may be made a part of the deposit by filing a verified statement of the loans with the commissioner, which statement shall be subject to audit at all times by the commissioner. Nonnegotiable securities where deposited with the commissioner shall be accompanied by transfer powers in due form. If the insurer uses the home office real estate under section 40-3128 (1) as a deposit, a deed of trust to the commissioner shall be completed in due form and recorded prior to being deposited with the commissioner.

(6) If default occurs in the payment of interest or principal of any deposited security and such default continues for a period of one hundred twenty (120) days, the commissioner may declare such security no longer eligible for deposit under this section.

History: En. Sec. 93, Ch. 286, L. 1959.

Collateral References

Insurance 8.

44 C.J.S. Insurance § 72.

29 Am. Jur. 473, Insurance, §§ 57 et seq.

Remedy of creditor of corporation to

reach funds or securities deposited with state official as security for corporation's obligations. 101 ALR 496.

Character or class of claims protected by deposit by foreign corporation as condition of doing business, and rank or priority of such claims. 104 ALR 748.

40-3013. Valuation of bonds. (1) All bonds or other evidences of debt having a fixed term and rate of interest held by an insurer may, if amply secured and not in default as to principal or interest, be valued as follows:

(a) If purchased at par, at the par value.

(b) If purchased above or below par, on the basis of the purchase price adjusted so as to bring the value to par at maturity and so as to yield in the meantime the effective rate of interest at which the purchase was made, or in lieu of such method, according to such accepted method of valuation as is approved by the commissioner.

(c) Purchase price shall in no case be taken at a higher figure than the actual market value at the time of purchase, plus actual brokerage, transfer, postage or express charges paid in the acquisition of such securities.

(d) Unless otherwise provided by valuation established or approved by the commissioner, no such security shall be carried at above the call price for the entire issue during any period within which the security may be so called.

(2) The commissioner shall have full discretion in determining the method of calculating values according to the rules set forth in this section.

History: En. Sec. 94, Ch. 286, L. 1959.

40-3014. Valuation of other securities. (1) Securities, other than those referred to in section 40-3013, held by an insurer shall be valued, in the discretion of the commissioner, at their market value, or at their appraised value, or at prices determined by him as representing their fair market value.

(2) Preferred or guaranteed stocks or shares while paying full dividends may be carried at a fixed value in lieu of market value, at the discretion of the commissioner and in accordance with such method of computation as he may approve.

History: En. Sec. 95, Ch. 286, L. 1959.

40-3015. Valuation of property. (1) Real property acquired pursuant to a mortgage loan or contract for sale, in the absence of a recent appraisal deemed by the commissioner to be reliable, shall not be valued at an amount greater than the unpaid principal of the defaulted loan or contract at the date of such acquisition, together with any taxes and expenses paid or incurred in connection with such acquisition, and the cost of improvements thereafter made by the insurer and any amounts thereafter paid by the insurer on assessments levied for improvements in connection with the property.

(2) Other real property held by an insurer shall not be valued at an amount in excess of fair value as determined by recent appraisal. If valuation is based on an appraisal more than three years old, the commissioner may at his discretion call for and require a new appraisal in order to determine fair value.

(3) Personal property acquired pursuant to chattel mortgages made in accordance with section 40-3127 shall not be valued at an amount greater than the unpaid balance of principal on the defaulted loan at the date of acquisition, together with taxes and expenses incurred in connection with such acquisition, or the fair value of such property, whichever amount is the lesser.

History: En. Sec. 96, Ch. 286, L. 1959.

40-3016. Valuation of purchase money mortgages. Purchase money mortgages on real property referred to in subsection (1) of section 40-3015 of this chapter shall be valued in an amount not exceeding the acquisition cost of the real property covered thereby or ninety per cent (90%) of the fair value of such real property, whichever is less.

History: En. Sec. 97, Ch. 286, L. 1959.

CHAPTER 31

INVESTMENTS

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- 40-3132. Special investments by title insurer.
- 40-3133. Prohibited investments and investment underwriting.
- 40-3134. Investments of foreign insurers.

40-3101. Scope of chapter. Except as to section 40-3134, this chapter shall apply to domestic insurers only.

History: En. Sec. 98, Ch. 286, L. 1959.

40-3102. Eligible investments. (1) Insurers shall invest in or lend their funds on the security of, and shall hold as invested assets, only eligible investments as prescribed in this chapter.

(2) Any particular investment held by an insurer on the effective date of this code, and which was a legal investment at the time it was made, and which the insurer was legally entitled to possess immediately prior to such effective date, shall be deemed to be an eligible investment.

(3) Eligibility of an investment shall be determined as of the date of its making or acquisition, except as stated in subsection (2) above.

(4) Any investment limitation based upon the amount of the insurer's assets or particular funds shall relate to such assets or funds as shown by the insurer's annual statement as of the December 31 next preceding date of acquisition of the investment by the insurer, or as shown by a current financial statement filed with the commissioner.

History: En. Sec. 99, Ch. 286, L. 1959.

Collateral References

Insurance—36.

44 C.J.S. Insurance § 100.

40-3103. General qualifications. (1) No security or investment (other than real and personal property acquired under section 40-3128 (real estate) of this chapter) shall be eligible for acquisition unless it is interest bearing or interest accruing or dividend or income paying, if not then in default in any respect, and the insurer is entitled to receive for its exclusive account and benefit the interest or income accruing thereon.

(2) No security or investment shall be eligible for purchase at a price above its market value.

(3) No provision of this chapter shall prohibit the acquisition by an insurer of other or additional securities or property if received as a dividend or as a lawful distribution of assets, or under a lawful and bona fide agreement of bulk reinsurance, merger, or consolidation. Any investment so acquired which is not otherwise eligible under this chapter shall be disposed of pursuant to section 40-3130 if personal property or securities, or pursuant to section 40-3129 if real property.

History: En. Sec. 100, Ch. 286, L. 1959.

40-3104. Authorization of investment. An insurer shall not make any investment or loan (other than policy loans or annuity contract loans of a life insurer) unless the same is authorized or approved by the insurer's board of directors or by a committee authorized by such board and charged with the supervision or making of such investment or loan. The minutes of any such committee shall be recorded and regular reports of such committee shall be submitted to the board of directors.

History: En. Sec. 101, Ch. 286, L. 1959.

40-3105. Diversification of investments. An insurer shall invest in or hold as admitted assets categories of investments only within applicable limits as follows:

(1) One person. An insurer shall not, except with the consent of the commissioner, have at any one time any combination of investments in or loans upon the security of the obligations, property, or securities of any one person, or insurer, aggregating an amount exceeding five per cent of the insurer's assets. This restriction shall not apply as to general obligations of the United States of America or of any state or include policy loans made under section 40-3121.

(2) Voting stock. An insurer shall not invest in or hold at any one time more than ten per cent of the outstanding voting stock of any corporation, except with the consent of the commissioner given with respect to voting rights of preference stock during default of dividends. This provision does not apply as to stock of a wholly-owned subsidiary of the insurer or to controlling stock of an insurer acquired under section 40-3117.

(3) Minimum capital. An insurer (other than title insurer) shall invest and maintain invested funds not less in amount than the minimum paid-in capital stock required under this code of a domestic stock insurer transacting like kinds of insurance, only in cash and the securities provided for under the following sections of this chapter: Section 40-3106 (United States or Canadian government obligations), Section 40-3108 (state, county, municipal, etc., obligations), and Section 40-3126 (real estate mortgages).

(4) Life insurance reserves. A life insurer shall also invest and keep invested its funds in amount not less than the reserves under its life insurance policies and annuity contracts (other than variable annuities) in force, in cash and/or the securities or investments provided for under section 40-3012.

(5) Corporate obligations. Except with the commissioner's consent, an insurer shall not have invested at any one time more than twenty per cent of its assets in the class of securities described in section 40-3114

(corporate bonds and debentures), exclusive of obligations of public utilities.

(6) **Common stocks.** An insurer may invest and have invested at any one time in aggregate amount not more than ten per cent of its assets in all stocks under sections: 40-3116 (common stocks), 40-3117 (insurance stocks), and 40-3120 (investment trust certificates). Determination of the amount which an insurer has invested in common stocks for the purposes of this provision shall be based on the cost of such stocks to the insurer. This provision shall not apply as to stock of a controlled or subsidiary insurance corporation or other corporations under sections 40-3117 and 40-3118.

(7) **Miscellaneous.** Except with the commissioner's consent, an insurer shall not have invested at any one time more than ten per cent of its assets in the class of securities described in any one of the following sections: sections 40-3110 (improvement district obligations), 40-3115 (preferred or guaranteed stock), and 40-3119 (equipment trust certificates).

(8) **Other specific limits.** Limits as to investments in the category of real estate shall be as provided in section 40-3128; and other specific limits shall apply as stated in the sections dealing with other respective kinds of investments.

History: En. Sec. 102, Ch. 286, L. 1959.

40-3106. United States or Canadian government obligations. An insurer may invest in bonds, notes, warrants and other evidences of indebtedness which are direct obligations of the United States of America or of Canada or for which the full faith and credit of the United States of America or of Canada is pledged for the payment of principal and interest.

History: En. Sec. 103, Ch. 286, L. 1959.

40-3107. Loans guaranteed by the United States or Canada. An insurer may invest in loans guaranteed as to principal and interest by the United States of America or Canada, or by any agency or instrumentality of the United States of America or Canada.

History: En. Sec. 104, Ch. 286, L. 1959.

Cross-Reference

Investments in federally guaranteed housing bonds, secs. 35-142, 35-143.

40-3108. State, county, municipal, and school obligations. An insurer may invest any of its funds in bonds or other evidences of indebtedness which are general obligations of, or are secured by pledge of specific revenues by, this state or of any other state of the United States or province of Canada, or of any of the counties or incorporated cities or towns, or duly organized school districts, or other taxing districts of such states or provinces.

History: En. Sec. 105, Ch. 286, L. 1959.

40-3109. Revenue bonds. An insurer may invest in bonds, notes or evidences of indebtedness of any state of the United States or province of Canada or any political subdivision thereof or any agency or instrumentality of any of the foregoing, which are payable from revenues or

earnings specifically pledged for the payment of the principal and interest on such obligations, and for the payment of which a lawful sinking fund or reserve fund has been established and is being maintained.

History: En. Sec. 106, Ch. 286, L. 1959.

40-3110. Improvement district obligations. An insurer may invest in bonds, notes or evidences of indebtedness issued by any local improvement district in this or any other state to finance local improvements authorized by law, if the principal and interest of such obligations is payable from assessments on real property within such local improvement district. No such investment shall be made if the face value of all such obligations, together with all similar obligations of such improvement district outstanding, exceed fifty per cent (50%) of the market value of the real property and improvements upon which such bonds or the assessments for the payment of principal and interest thereon are liens inferior only to the liens for general ad valorem property taxes.

History: En. Sec. 107, Ch. 286, L. 1959.

40-3111. Irrigation district obligations. An insurer may invest in the bonds, notes or evidences of indebtedness of any irrigation district organized under the laws of Montana.

History: En. Sec. 108, Ch. 286, L. 1959.

40-3112. Obligations, stock of certain federal agencies. An insurer may invest in the obligations, and/or stock where stated, of the following agencies of the government of the United States of America, whether or not such obligations are guaranteed by such government:

- (1) Commodity Credit Corporation.
- (2) Federal Intermediate Credit Banks.
- (3) Federal Land Banks.
- (4) Central Bank for Co-operatives.
- (5) Federal Home Loan Banks, and stock thereof.
- (6) Federal National Mortgage Association, and stock thereof when acquired in connection with sale of mortgage loans to such association.
- (7) Any other similar agency of the government of the United States of America and of similar financial quality.

History: En. Sec. 109, Ch. 286, L. 1959.

Cross-Reference

Investments in federally guaranteed housing bonds, secs. 35-142, 35-143.

40-3113. International bank. An insurer may invest in obligations issued, assumed or guaranteed by the International Bank for Reconstruction and Development.

History: En. Sec. 110, Ch. 286, L. 1959.

40-3114. Corporate bonds and debentures. (1) An insurer may invest in bonds, debentures, notes and other evidences of indebtedness issued, assumed or guaranteed by any solvent institution existing under the laws of the United States of America or of Canada, or any state of [or] province thereof, which are not in default as to principal or interest and which

are secured by adequate collateral and bear fixed interest and if during each of any three, including either [of] the last two, of the five fiscal years next preceding the date of acquisition by the insurer, the net earnings of the issuing, assuming or guaranteeing institution available for its fixed charges, as hereinafter defined, shall have been not less than one and one-quarter times the total of its fixed charges for such year. In determining the adequacy of collateral security, not more than one-third of the total value of such required collateral shall consist of common stock.

(2) An insurer may invest in secured and unsecured obligations of such institutions (other than obligations described in subsection (1) bearing interest at a fixed rate, with mandatory principal and interest due at specified times, if the net earnings of the issuing, assuming or guaranteeing institution available for its fixed charges for a period of five (5) fiscal years next preceding the date of acquisition by such insurer have averaged per year not less than one and one-half times its average annual fixed charges applicable to such period and if during either of the last two (2) years of such period such net earnings have been not less than one and one-half times its fixed charges for such year.

(3) An insurer may invest in adjustment, income, or other contingent interest obligations of such institutions if the net earnings of the issuing, assuming or guaranteeing institution available for its fixed charges for a period of five fiscal years next preceding the date of acquisition by the insurer shall have averaged per year not less than one and one-half times the sum of its average annual fixed charges and its average annual maximum contingent interest applicable to such period and if during either of the last two years of such period such net earnings shall have been not less than one and one-half times the sum of its fixed charges and maximum contingent interest for such year.

(4) Within the meaning of this section, the term "net earnings available for fixed charges" means net income after deducting operating and maintenance expenses, taxes other than federal income taxes, depreciation and depletion, but excluding extraordinary nonrecurring items of income or expense appearing in the regular financial statements of the issuing, assuming or guaranteeing institutions. The term "fixed charges" shall include interest on funded and unfunded debt, amortization of debt discount, and rentals for leased properties.

History: En. Sec. 111, Ch. 286, L. 1959.

Compiler's Note

The compiler has inserted the bracketed words "or" and "of" in subd. (1).

40-3115. Preferred or guaranteed stock. An insurer may invest in preferred or guaranteed stocks or shares of any solvent institution existing under the laws of the United States of America or of Canada, or of any state or province thereof, if all of the prior obligations and prior preferred stocks, if any, of such institution at the date of acquisition of the investment by such insurer are eligible as investments under this chapter and if the net earnings of such institution available for its fixed charges during each of the last two (2) years have been, and during each of the last five (5) years have averaged, not less than one and one-half times the sum of its

average annual fixed charges, if any, its average annual maximum contingent interest, if any, and its average annual preferred dividend requirements. For the purposes of this section such computation shall refer to the fiscal years immediately preceding the date of acquisition of the investment by the insurer, and the term "preferred dividend requirement" shall be deemed to mean cumulative or noncumulative dividends, whether paid or not.

History: En. Sec. 112, Ch. 286, L. 1959.

40-3116. Common stocks. An insurer may invest in nonassessable common stocks, other than insurance stocks, of any solvent corporation existing under the laws of the United States of America or of Canada, or any state or province thereof, if cash or stock dividends have been earned and paid on its common stock in each of the five fiscal years preceding such acquisition; and if, further, all prior obligations or preference stock of such corporation, if any, are eligible for investment under this chapter. If the issuing corporation has not been in legal existence for the whole of the five preceding fiscal years but was formed as a consolidation or merger of two or more businesses, the test of eligibility for investment of its common stock under this section shall be based upon consolidation pro-forma statements of the predecessor or constituent institutions.

History: En. Sec. 113, Ch. 286, L. 1959.

40-3117. Insurance stocks. (1) An insurer may invest in the stocks of other solvent insurers formed under the laws of this or another state, which stocks meet the applicable requirements of sections 40-3115 (preferred or guaranteed stock) and 40-3116 (common stocks).

(2) With the commissioner's consent an insurer may acquire and hold the controlling interest in the outstanding voting stock of another stock insurer formed under the laws of this or another state. All stocks under this subsection shall be subject to the limitation as to amount as provided in section 40-3118.

History: En. Sec. 114, Ch. 286, L. 1959.

40-3118. Stocks of subsidiaries. With the commissioner's consent an insurer may invest in the stock of its wholly-owned subsidiary insurance corporation; or in the stock of its wholly-owned subsidiary business corporation formed under the laws of this state and necessary and incidental to the convenient operation of the insurer's insurance business or to the administration of any of its investments. All of the insurer's investments under this section, together with its investments in insurance stocks under section 40-3117 (2), shall not at any time exceed the amount of the investing insurer's surplus, if a life insurer, or its surplus to policyholders if other than a life insurer.

History: En. Sec. 115, Ch. 286, L. 1959.

40-3119. Equipment trust certificates. An insurer may invest in equipment trust obligations or certificates adequately secured and evidencing an interest in transportation equipment, wholly or in part within the United

States of America, which obligations or certificates carry the right to receive determined portions of rental, purchase, or other fixed obligatory payments to be made for the use or purchase of such transportation equipment.

History: En. Sec. 116, Ch. 286, L. 1959.

40-3120. Investment trust securities. An insurer may invest in the securities of any management type investment company or investment trust registered with the Federal Securities and Exchange Commission under the Investment Company Act of 1940 as from time to time amended, if such investment company or trust has assets not less than fifty million dollars (\$50,000,000) as at date of investment by the insurer.

History: En. Sec. 117, Ch. 286, L. 1959.

40-3121. Policy loans. A life insurer may lend to its policyholder upon pledge of the policy as collateral security, any sum not exceeding the cash surrender value of the policy; or may lend against pledge or assignment of any of its supplementary contracts or other contracts or obligations, so long as the loan is adequately secured by such pledge or assignment. Loans so made are eligible investments of the insurer.

History: En. Sec. 118, Ch. 286, L. 1959.

Collateral References

Insurance—36, 57(1).

44 C.J.S. Insurance §§ 100, 110.

29 Am. Jur. 901, Insurance, § 614.

40-3122. Collateral loans. An insurer may lend and thereby invest its funds upon the pledge of securities eligible for investment under this chapter. As at date made, no such loan shall exceed in amount seventy-five per cent (75%) of the market value of such collateral pledged. The amount so loaned shall be included pro rata in determining the maximum percentage of funds permitted under this chapter to be invested in the respective categories of securities so pledged.

History: En. Sec. 119, Ch. 286, L. 1959.

40-3123. Savings and loan. To the extent that such an account is insured by the Federal Savings and Loan Insurance Corporation, an insurer may invest in share or savings accounts of savings and loan and building and loan associations.

History: En. Sec. 120, Ch. 286, L. 1959.

40-3124. Foreign securities. An insurer authorized to transact insurance in a foreign country may make investments, in aggregate amount not exceeding its deposit and obligations incurred in such country, in securities of or in such country possessing characteristics and of a quality similar to like investments required pursuant to this chapter for investments in the United States of America. Canadian securities eligible for investment under other provisions of this chapter are not subject to this section.

History: En. Sec. 121, Ch. 286, L. 1959.

40-3125. Miscellaneous investments. (1) An insurer may make loans or investments not otherwise expressly permitted under this chapter, in

aggregate amount not over five per cent of the insurer's assets and not over one per cent of such assets as to any one such loan or investment, if such loan or investment fulfills the requirements of section 40-3103 and otherwise qualifies as a sound investment. But no such loan or investment shall be represented by:

(a) Any item described in section 40-3003 (assets not allowed), or any loan or investment otherwise expressly prohibited.

(b) Agents' balances, or amounts advanced to or owing by agents or former agents of the insurer, whether or not secured; except as to policy loans, mortgage loans, and collateral loans otherwise authorized under this chapter.

(c) Any category of loans or investments eligible under any other provisions of this chapter.

(d) Any asset theretofore acquired or held by the insurer under any other category of loans or investments eligible under this chapter.

(2) The insurer shall keep a separate record of all loans and investments made under this section.

History: En. Sec. 122, Ch. 286, L. 1959.

40-3126. Real estate mortgages. (1) An insurer may invest any of its funds in bonds, notes or other evidences of indebtedness which are secured by first mortgages or deeds of trust upon improved real property located in the United States or Canada, or which are secured by first mortgages or deeds of trust upon leasehold estates having an unexpired term of not less than twenty-one (21) years (inclusive of the term or terms which may be provided by enforceable options of renewal) in improved real property located in the United States or Canada. In all cases the security for the loan must be a first lien upon such real property, and there must not be any condition or right of re-entry or forfeiture not insured against, under which, in the case of real property other than leaseholds, such lien can be cut off or subordinated or otherwise disturbed or under which, in the case of leaseholds, the insurer is unable to continue the lease in force for the duration of the loan. Nothing herein shall prohibit any investment by reason of the existence of any prior lien for ground rents, taxes, assessments or other similar charges not yet delinquent. This section shall not be deemed to prohibit investment in mortgages or similar obligations when made under section 40-3124 (foreign securities).

(2) "Improved real estate" means all farm lands used for tillage, crop, or pasture, timberlands, and all real estate on which permanent improvements suitable for residence, institutional, commercial or industrial use are situated.

(3) No such mortgage loan or loans made or acquired by an insurer on any one property shall, at the time of investment by the insurer, exceed the larger of the following amounts as applicable:

(a) Two-thirds of the value of the real property or leasehold securing the same; provided however if said real property or leasehold consists of one or two family residential property, three-fourths of said value; or

(b) The amount of any insurance or guaranty of such loan by the United States of America or by any agency or instrumentality thereof; or

(c) The amounts provided in subsection (a) herein, plus the amount by which the excess of such loan over such amount is insured or guaranteed by the United States of America or by any agency or instrumentality thereof.

Except, that in the case of a purchase money mortgage given to secure the purchase price of real estate sold by the insurer, the amount so loaned or invested shall not exceed the unpaid portion of the purchase price.

(4) No such mortgage loan or loans shall be made or acquired by an insurer except after an appraisal made by a qualified appraiser for the purpose of such investment.

(5) No such mortgage loan made or acquired by an insurer which is a participation or a part of a series or issue secured by the same mortgage or deed of trust shall be a lawful investment under this section unless the entire series or issue which is secured by the same mortgage or deed of trust is held by such insurer, or unless the insurer holds a senior participation in such mortgage or deed of trust, giving it substantially the rights of a first mortgagee.

(6) No mortgage loan upon a leasehold shall be made or acquired pursuant to this section unless the terms thereof shall provide for amortization payments to be made by the borrower on the principal thereof at least once in each year in amounts sufficient completely to amortize the loan within a period of four-fifths of the term of the leasehold, inclusive of the term which may be provided by an enforceable option of renewal, which is unexpired at the time the loan is made, but in no event exceeding thirty-five (35) years.

History: En. Sec. 123, Ch. 286, L. 1959;
amd. Sec. 1, Ch. 20, L. 1961.

40-3127. Chattel mortgages. (1) In connection with a mortgage loan on the security of real estate designed and used primarily for residential purposes only, which mortgage loan was acquired pursuant to section 40-3126 of this chapter, an insurer may lend or invest an amount not exceeding twenty per cent (20%) of the amount loaned on or invested in such real estate mortgage on the security of a chattel mortgage to be amortized by regular periodic payments within a term of not more than five (5) years, and representing a first and prior lien, except for taxes not then delinquent, on personal property constituting durable equipment owned by the mortgagor and kept and used in the mortgaged premises.

(2) For the purposes of this section, the term "durable equipment" shall include only mechanical refrigerators, air conditioning equipment, mechanical laundering machines, heating and cooking stoves and ranges, and, in addition, in the case of apartment houses, motels and hotels, room furniture and furnishings.

(3) Prior to the acquisition of a chattel mortgage hereunder, items of property to be included therein shall be separately appraised by a qualified appraiser and the fair market value thereof determined. No such chattel mortgage loan shall exceed in amount the same ratio of loan to the value of the property as is applicable to the companion loan on the real property.

(4) This section shall not prohibit an insurer from taking liens on personal property as additional security for any investment otherwise eligible under this chapter.

History: En. Sec. 124, Ch. 236, L. 1959.

40-3128. Real estate. An insurer may invest in real estate only if used for the purposes or acquired in the manners, and within the limits as follows:

(1) The land and the buildings thereon in which it has its principal office, and such other real estate as shall be requisite for its convenient accommodation in the transaction of its business. Except with the consent of the commissioner, all such investments shall not aggregate more than five per cent (5%) of the insurer's assets.

(2) Real estate acquired in satisfaction of loans, mortgages, liens, judgments, decrees or debts previously owing to the insurer in the course of its business.

(3) Real estate acquired in part payment of the consideration on the sale of other real estate owned by it, if such transaction does not increase the insurer's investment in real estate.

(4) Real estate acquired by gift or devise, or through merger, consolidation, or bulk reinsurance of another insurer under this code.

(5) The seller's interest in real property subject to an agreement of purchase or sale, but the sum invested in any such parcel of real estate shall not exceed three-fourths of the market value of such parcel provided the same consists of one or two family residential property and two-thirds of the market value of all other such parcels of real estate.

(6) Real estate, or any interest therein acquired or held by purchase, lease or otherwise, other than real estate to be used primarily for agricultural, ranch, mining, development of oil or mineral resources, recreational, amusement or club purposes, acquired as an investment for the production of income, or acquired to be improved or developed for such investment purposes pursuant to an existing program therefor. The insurer may hold, improve, develop, maintain, manage, lease, sell, and convey real estate acquired by it under this provision. An insurer shall not, except with the commissioner's consent, have at any one time invested in real estate under this subdivision an amount exceeding five per cent (5%) of its assets.

(7) Additional real estate and equipment incident to real estate, if necessary or convenient for the purpose of enhancing the sale or other value of real estate previously acquired or held by the insurer under subdivisions (2), (3), (4), or (6) of this section. Such real estate and equipment shall be included, together with the real estate for the enhancement of which it was acquired, for the purpose of applicable investment limits, and shall be subject to disposal at the same time and under the same conditions as applying to such enhanced real estate under section 40-3129.

(8) Except with the commissioner's consent, all real estate owned by the insurer under this section, except as to seller's interest specified in subdivision (5), shall not at any one time exceed ten per cent (10%) of the insurer's assets.

History: En. Sec. 125, Ch. 286, L. 1959;
amd. Sec. 1, Ch. 16, L. 1961.

Collateral References

Insurance—36, 57(1).
44 C.J.S. Insurance §§ 99, 110.
29 Am. Jur. 500, Insurance, § 82.

40-3129. Time limit for disposal of real estate. (1) Except as stated in subsection (3) of this section, the insurer shall dispose of real estate acquired under subdivision (1) of section 40-3128 within five (5) years after it has ceased to be necessary for the convenient accommodation of the insurer in the transaction of its business.

(2) Except as stated in subsection (3) of this section, the insurer shall dispose of real estate acquired under subdivisions (2), (3), and (4) of section 40-3128 within five (5) years after the date of acquisition.

(3) Upon proof satisfactory to him that the interests of the insurer will suffer materially by the forced sale thereof, the commissioner may by order grant a reasonable extension of the period, as specified in such order, within which the insurer shall dispose of any particular parcel of such real estate; unless the insurer elects to hold such real estate as an investment for income purposes under subdivision (6) of section 40-3128, in which event thereafter such real estate shall be deemed to have been acquired at a cost equal to its book value at the time of such election and to be held under, and subject to, the provisions of such subdivision (6).

History: En. Sec. 126, Ch. 286, L. 1959.

40-3130. Time limit for disposal of other ineligible property and securities. Any personal property or securities lawfully acquired by an insurer which it could not otherwise have invested in or loaned its funds upon at the time of such acquisition, shall be disposed of within three (3) years from date of acquisition unless within such period the security has attained to the standard of eligibility; except, that any security or personal property acquired under any agreement of bulk reinsurance, merger, or consolidation, may be retained for a longer period if so provided in the plan for such reinsurance, merger, or consolidation as approved by the commissioner under chapter 47 of this title. Upon application by the insurer and proof that forced sale of any such property or security would materially injure the interests of the insurer, the commissioner may extend the disposal period for an additional reasonable time.

History: En. Sec. 127, Ch. 286, L. 1959.

40-3131. Failure to dispose of real estate, property, or securities—effect, penalty. (1) Any real estate, personal property, or securities lawfully acquired and held by an insurer after expiration of the period for disposal thereof or any extension of such period granted by the commissioner, as provided in sections 40-3129 or 40-3130, shall not be allowed as an asset of the insurer.

(2) The insurer shall forthwith dispose of any ineligible investment unlawfully acquired by it, and the commissioner may, in his discretion, suspend or revoke the insurer's certificate of authority if the insurer fails to dispose of the investment within such reasonable time as the commissioner may, by his order, specify.

History: En. Sec. 128, Ch. 286, L. 1959.

40-3132. Special investments by title insurer. (1) In addition to other investments eligible under this chapter, a title insurer may invest and have invested an amount not exceeding fifty per cent (50%) of its paid-in capital stock in its abstract plant and equipment, and, with the commissioner's consent, in stock of abstract companies. If the insurer transacts kinds of insurance in addition to title insurance, for the purposes of this section its paid-in capital stock shall be prorated between title insurance and such other insurances upon the basis of the reserves maintained by the insurer for the various kinds of insurance; but the capital so assigned to title insurance shall in no event be less than one hundred thousand dollars (\$100,000).

(2) Investments authorized by this section shall not be credited against the insurer's required unearned premium or guaranty fund reserve provided for under section 40-3010.

(3) Any such abstract plant and equipment shall not be so allowed as an asset in any determination of the insurer's financial condition at a value greater than actual cost.

History: En. Sec. 129, Ch. 286, L. 1959.

40-3133. Prohibited investments and investment underwriting. (1) In addition to investments excluded pursuant to other provisions of this code, an insurer shall not invest in or lend its funds upon the security of:

(a) Issued shares of its own capital stock, except for the purpose of mutualization under section 40-4743.

(b) Except with the advance consent of the commissioner, securities issued by any corporation or enterprise the controlling interest of which is, or after such acquisition by the insurer will be held directly or indirectly by the insurer or any combination of the insurer and the insurer's directors, officers, parent corporation, subsidiaries, or controlling stockholders. Investments in subsidiaries under section 40-3118 shall not be subject to this provision.

(c) Any note or other evidence of indebtedness of any director, officer, or controlling stockholders of the insurer, except as to policy loans authorized under section 40-3121.

(2) No insurer shall underwrite or participate in the underwriting of an offering of securities or property by any other person.

History: En. Sec. 130, Ch. 286, L. 1959.

40-3134. Investments of foreign insurers. The investment portfolio of a foreign insurer shall be as permitted by the laws of its domicile but shall be of a quality substantially as high as that required under this chapter for similar funds of like domestic insurers. For the purposes of this provision, the domicile of an alien insurer, other than a life insurer formed under the laws of Canada, shall be deemed to be that state in which it maintains its principal deposit.

History: En. Sec. 131, Ch. 286, L. 1959.

CHAPTER 32

ADMINISTRATION OF DEPOSITS

Section 40-3201.	Authorized deposits of insurers.
40-3202.	Purpose of deposit.
40-3203.	Securities eligible for deposit.
40-3204.	Depository or custodian.
40-3205.	Record of deposits—liability of commissioner and state.
40-3206.	Responsibility for safekeeping.
40-3207.	Assignment, conveyance of assets or securities.
40-3208.	Appraisal.
40-3209.	Rights of insurer during solvency.
40-3210.	Excess deposits.
40-3211.	Levy upon deposit.
40-3212.	Deficiency of deposit.
40-3213.	Duration and release of deposit.

40-3201. Authorized deposits of insurers. The following deposits of insurers when made through the commissioner shall be accepted and held, and shall be subject to the provisions of this chapter.

(1) Deposits required under this code for authority to transact insurance in this state.


(2) Deposits of domestic insurers when made pursuant to the laws of other states, provinces, and countries as requirement for authority to transact insurance in such state, province, or country.

(3) Deposits of reserves made by domestic life insurers under section 40-3012.

(4) Deposits in such additional amounts as are permitted to be made under section 40-3210.

History: En. Sec. 132, Ch. 286, L. 1959.

Collateral References

Insurance  8.

44 C.J.S. Insurance § 72.

40-3202. Purpose of deposit. Such deposits shall be held for purposes as follows:

(1) Deposits made in this state under section 40-2809 shall be held for the purpose stated in such section.

(2) A deposit made in this state by a domestic insurer transacting insurance in another state, province, or country, and as required by the laws of such other state, province, or country, shall be held for the protection of all the insurer's policyholders or all its policyholders and creditors or for such other purpose or purposes as may be specified pursuant to such laws.

(3) Deposits of reserves made by domestic life insurers under section 40-3012 shall be held for the common benefit of all the holders of its life insurance policies and annuity contracts.

(4) Deposits required pursuant to the retaliatory law, section 40-2826, shall be held for such purposes as is required by such law, and as specified by the commissioner's order requiring such deposit to be made.

History: En. Sec. 133, Ch. 286, L. 1959.

by deposit by foreign corporation as condition of doing business, and rank or priority of such claims, 104 ALR 748.

Collateral References

Character or class of claims protected

40-3203. Securities eligible for deposit. (1) All such deposits required under section 40-2809 for authority to transact insurance in this state shall consist of certificates of deposit, or any combination of securities of the kinds described in the following sections of this code: sections 40-3106 (United States and Canadian government obligations), 40-3108 (state, county, municipal, and school obligations), and 40-3109 (revenue bonds).

(2) All other deposits of a domestic insurer held in this state pursuant to the laws of another state, province, or country shall be comprised of assets of the kinds described in subsection (1), above, and of such additional kind or kinds of securities required or permitted by the laws of such state, province, or country except common stocks, mortgages of any kind and real estate.

(3) Deposits of the reserves of a domestic life insurer shall consist of securities and assets as provided under section 40-3012.

(4) Deposits of foreign insurers made in this state under the retaliatory law, section 40-2826, shall consist of such assets as are required by the commissioner pursuant to such law.

History: En. Sec. 134, Ch. 286, L. 1959.

40-3204. Depositary or custodian. (1) Deposits made in this state under this code shall be made through the office of the commissioner in safe deposit or under custodial arrangements as required or approved by the commissioner consistent with the purposes of such deposit, with an established safe deposit institution, bank, or trust company located in the city of Helena, state of Montana, selected by the insurer with the commissioner's approval.

(2) No safe deposit shall be used for any such deposit unless the box or compartment in which are kept the assets and securities comprising the deposit requires two separate and distinctly differing keys or one key and a combination (in the case of a box having a combination lock) to open the same. One of such keys or the combination shall at all times be kept by the commissioner, and the other key or the combination shall at all times be kept by the insurer. Such box or compartment shall not at any time be opened or remain open except through the joint action and in the presence of both the commissioner and a duly authorized officer or representative of the insurer.

(3) Where of convenience to the insurer in the buying, selling, and exchange of securities comprising its deposit, and in the collection of interest and other income currently accruing thereon, the insurer may with the commissioner's written approval in advance, deposit certain of such securities under custodial arrangements with an established bank or trust company located outside this state, so long as receipts representing all such securities are issued by such custodian bank or trust company and are held in safe deposit or custody subject to the requirements of subsections (1) and (2) of this section.

(4) The form and terms of all such depositary or custodial agreements shall be as prescribed or approved by the commissioner consistent with the applicable provisions of this code.

(5) The compensation and expenses of the depository or custodian shall be borne by the insurer.

History: En. Sec. 135, Ch. 286, L. 1959.

40-3205. Record of deposits—liability of commissioner and state. (1)

The commissioner shall give to the depositing insurer vouchers as to all assets and securities deposited by it in this state through the commissioner as provided in this code.

(2) The commissioner shall keep a record of the assets and securities comprising each deposit, showing as far as practical the amount and market value of each item, and all his transactions relative thereto.

History: En. Sec. 136, Ch. 286, L. 1959.

40-3206. Responsibility for safekeeping. The commissioner and the state of Montana shall have no liability as to the safekeeping of any such deposit by the depository or custodian thereof.

History: En. Sec. 137, Ch. 286, L. 1959.

40-3207. Assignment, conveyance of assets or securities. All securities not negotiable by delivery and deposited under this code shall be duly assigned to the commissioner and his successors in office. In the case of securities held under custodial arrangements outside this state pursuant to section 40-3204 (3), the custodian's receipt for such securities shall be so delivered, if negotiable, or assigned to the commissioner if thereby legal title to such securities is vested in the commissioner. All other assets so deposited the insurer shall transfer or convey to the commissioner and his successors in office. Upon release to the insurer of any such asset or security the commissioner shall reassign or transfer or reconvey the same to the insurer.

History: En. Sec. 138, Ch. 286, L. 1959.

40-3208. Appraisal. The commissioner may, in his discretion, prior to acceptance for deposit of any particular asset or security, or at any time thereafter while so deposited, have the same appraised or valued by competent appraisers. The reasonable costs of any such appraisal or valuation shall be borne by the insurer.

History: En. Sec. 139, Ch. 286, L. 1959.

40-3209. Rights of insurer during solvency. So long as the insurer remains solvent and is in compliance with this code it may:

(1) Demand, receive, sue for and recover the income from the assets or securities deposited;

(2) Exchange and substitute for the deposited assets or securities, or any part thereof, other eligible assets or securities of equivalent or greater value; and

(3) At any reasonable time inspect any such deposit.

History: En. Sec. 140, Ch. 286, L. 1959.

40-3210. Excess deposits. An insurer may so deposit and have on deposit assets or securities in an amount exceeding its deposit required or

otherwise permitted under this code by not more than twenty per cent (20%) of such required or permitted deposit or \$50,000, whichever is the larger amount, for the purpose of absorbing fluctuations in the value of assets and securities deposited, and to facilitate the exchange and substitution of such assets and securities. During the solvency of the insurer any such excess shall be released to the insurer upon its request. During the insolvency of the insurer such excess deposit shall be released only as provided in section 40-3213 (4).

History: En. Sec. 141, Ch. 286, L. 1959.

40-3211. Levy upon deposit. No judgment creditor or other claimant of an insurer shall have the right to levy upon any of the assets or securities held in this state as a deposit for the protection of the insurer's policyholders or policyholders and creditors. As to deposits pursuant to the retaliatory law, section 40-2826, levy thereupon shall be permitted if so provided in the commissioner's order under which the deposit is made.

History: En. Sec. 142, Ch. 286, L. 1959.

Collateral References

Remedy of creditor of corporation to

reach funds or securities deposited with state official as security for corporation's obligations. 101 ALR 496.

40-3212. Deficiency of deposit. If for any reason the market value of assets and securities of an insurer held on deposit in this state, or in another state under custodial arrangements authorized by section 40-3204 (3), falls below the amount required under this code to be so held, the insurer shall promptly deposit other or additional assets or securities eligible for deposit under this chapter and in amount sufficient to cure such deficiency. If the insurer has failed to cure the deficiency within twenty (20) days after receipt of notice thereof by registered mail from the commissioner, the commissioner shall forthwith revoke the insurer's certificate of authority.

History: En. Sec. 143, Ch. 286, L. 1959.

40-3213. Duration and release of deposit. (1) Every deposit made in this state by an insurer pursuant to this code, including assets and securities held in another state under custodial arrangements permitted by section 40-3204 (3), shall be held as long as there is outstanding any liability of the insurer as to which the deposit was so required; or, if a deposit required under the retaliatory law, section 40-2826, the deposit shall be held for so long as the basis of such retaliation exists.

(2) Upon the request of a domestic insurer, the commissioner shall return to the insurer the whole or any portion of the assets and securities of the insurer held on deposit when the commissioner is satisfied that the assets and securities so to be returned are subject to no liability and are not required to be longer held by any provision of law or purposes of the original deposit. If the insurer has reinsured all its outstanding risks in another insurer or insurers authorized to transact insurance in this state then the commissioner shall deliver such assets and securities to such insurer or insurers so assuming such risks, upon (a) written notice to him by such domestic insurer that such assets and securities have been duly assigned, transferred and set over to such reinsuring insurer or insurers, which notice shall be accompanied by a duly verified copy of such assign-

ment, transfer, or conveyance, and (b) in the case of deposits of the reserves of domestic life insurers under section 40-3012, proof satisfactory to the commissioner that the reinsuring insurer or insurers has deposited or will deposit, and will maintain on deposit in public custody through the insurance supervisory official of its state of domicile, assets and securities of like quality in amount not less than the reserves then and thereafter of the policies and contracts so reinsured, in addition to any other deposit of such insurer required or permitted by law, and, unless the insurer is required so to deposit and maintain on deposit all of its reserves, that such deposit of such reserves will be so deposited and held on deposit for the special benefit and protection of the holders of the life insurance policies and annuity contracts so reinsured.

(3) The commissioner shall return to a foreign insurer any deposit made in this state by such insurer, when such insurer has ceased transacting insurance in this state, or in the United States, and the insurer is not subject to any liability in this state on account of which the deposit was held.

(4) If the insurer is subject to delinquency proceedings, as defined in chapter 51 of this title, upon the order of a court of competent jurisdiction the commissioner shall yield the assets and securities held on deposit to the receiver, conservator, rehabilitator, or liquidator of the insurer, or to any other properly designated official or officials who succeed to the management and control of the insurer's assets.

(5) No release of deposited assets shall be made except upon application to and the written order of the commissioner. The commissioner shall have no personal liability for any release of any such deposit or part thereof so made by him in good faith.

History: En. Sec. 144, Ch. 286, L. 1959.

CHAPTER 33

AGENTS, SOLICITORS AND ADJUSTERS

Section	40-3301.	Scope of chapter.
	40-3302.	"Agent" defined.
	40-3303.	"Life insurance agent" defined.
	40-3304.	"Solicitor" defined.
	40-3305.	Exceptions and exemptions from definition of agent and solicitor.
	40-3306.	"Adjuster" defined.
	40-3307.	License required, agents and solicitors—forms.
	40-3308.	General qualifications, agents and solicitors—other than life insurance agents.
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	40-3310.	Licensing of firms and corporations.
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	40-3312.	Application for license.
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	40-3315.	Issuance of license, and contents.
	40-3316.	Number of licenses, agents.
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	40-3318.	Rights of agent following termination of appointment.
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	40-3321.	Special requirements as to solicitors.
	40-3322.	Insurance vending machines.

- 40-3323. Place of business—display of license—records.
- 40-3324. Reporting and accounting for premiums.
- 40-3325. Exchange of business—sharing commissions.
- 40-3326. Life or disability agent may place excess or rejected business.
- 40-3327. Adjuster's license—qualifications—catastrophe adjustments.
- 40-3328. Continuance, expiration of licenses.
- 40-3329. Suspension, revocation, refusal of license.
- 40-3330. Procedure following suspension, revocation.
- 40-3331. Return of license.

40-3301. Scope of chapter. This chapter shall apply as to all stock, mutual and reciprocal insurers and as to all kinds of insurance and annuities.

History: En. Sec. 145, Ch. 286, L. 1959. insurance agents or brokers. 36 ALR 1512.

Collateral References

Insurance—12.

44 C.J.S. Insurance § 85.

29 Am. Jur. 537, Insurance, §§ 134 et seq.

Power of state to regulate and control

Regulation or control of insurance agents or brokers. 10 ALR 2d 950.

Duty and liability of insurance broker or agent to insured with respect to procurement, continuance, terms, and coverage of insurance policies. 29 ALR 2d 171.

40-3302. "Agent" defined. An "agent" is an individual, firm or corporation appointed by an insurer to solicit applications for insurance or annuities or to negotiate insurance on its behalf, and if authorized to do so by the insurer, to effectuate and countersign insurance contracts.

History: En. Sec. 146, Ch. 286, L. 1959.

40-3303. "Life insurance agent" defined. For the purposes of this chapter, "life insurance agent" includes also an agent of a life insurer who is or proposes to be licensed as to the same insurer for disability insurance in addition to life insurance and annuities. Unless licensed as a life insurance agent as required by section 40-3307, no person shall in this state solicit life insurance or annuities or procure applications therefor, or engage or hold himself out as engaging in the business of analyzing or abstracting life insurance policies or annuities or of counselling or advising or giving opinions (other than as a licensed attorney at law) relative to such insurance or annuities, for fee, commission or other compensation, other than as a salaried bona fide full-time employee so counselling and advising his employer relative to the insurance interests of the employer and of the subsidiaries or business affiliates of the employer, or with respect to the insurance interests of employees of such employer, subsidiaries, or affiliates under group insurance or similar insurance plans arranged by the employer or employers of such employees.

History: En. Sec. 147, Ch. 286, L. 1959.

DECISIONS UNDER FORMER LAW

Rights of Agent

Life insurance agent was not the proper party to bring action against state auditor

to have license granted by him to a foreign corporation declared void. Waite v. Holmes, 133 M 512, 327 P 2d 399, 407.

40-3304. "Solicitor" defined. A "solicitor" is an individual appointed and authorized by an agent to solicit applications for insurance, other than

life insurance or disability insurance, as a representative of such agent, and to collect premiums thereon when expressly so authorized by the agent.

History: En. Sec. 148, Ch. 286, L. 1959. providing that any person who shall solicit insurance shall be regarded as agent of insurance company. 48 ALR 1173.

Collateral References

Meaning of the term "solicit" in statute

40-3305. Exceptions and exemptions from definition of agent and solicitor. The definitions of agent and solicitor contained in sections 40-3302 through 40-3304 shall not be deemed to include:

(1) Individuals employed and used by agents for the performance of clerical, stenographic and similar office duties; incidental taking of an application for insurance from time to time in the office of the employing agent shall not constitute such an employee as an agent or solicitor if the employee's compensation is not contingent upon or relating to the volume of such applications, insurance or premiums.

(2) The supervising general, state or special agent, or other supervising officer or supervising salaried employee of an insurer, who solicits only with or in conjunction with duly licensed agents of the insurer.

(3) The attorney-in-fact of a reciprocal insurer, or the salaried traveling representative of a reciprocal or mutual insurer not compensated on a commission basis.

(4) A person who secures and forwards information for the purpose of an existing group insurance contract or for enrolling individuals under an existing group insurance contract or issuing certificates thereunder where no commission is paid for such services.

History: En. Sec. 149, Ch. 286, L. 1959.

40-3306. "Adjuster" defined. (1) An "adjuster" is a person who, on behalf of the insurer, for compensation as an independent contractor or as the employee of such an independent contractor, or for fee or commission, investigates and negotiates settlement of claims arising under insurance contracts.

(2) A licensed attorney at law who is qualified to practice law in this state, or a salaried employee of an insurer or of a managing general agent, or a licensed agent who adjusts or assists in adjustment of losses arising under policies issued by the insurer represented by such agent, is not deemed to be an adjuster for the purposes of this chapter.

History: En. Sec. 150, Ch. 286, L. 1959.

40-3307. License required, agents and solicitors—forms. (1) No person shall in this state act as or hold himself out to be an agent or solicitor, as to subjects of insurance located, resident or to be performed in this state, unless then licensed as such agent or solicitor under this chapter.

(2) No agent or solicitor shall solicit or take application for, procure, or place for others any kind of insurance as to which he is not then licensed.

(3) No agent shall place any business (other than coverage of his own risks) with any insurer as to which he does not then hold an appointment

or license as agent under this chapter, except as provided in section 40-3326 as to life or disability insurance agents.

(4) The commissioner shall prescribe and furnish forms required in connection with application for, issuance, continuation or termination of licenses and appointments.

History: En. Sec. 151, Ch. 286, L. 1959.

DECISIONS UNDER FORMER LAW

Protection from Competition petition. Waite v. Holmes, 133 M 512, 327 P 2d 399, 406.
Former section 40-1308 did not protect insurance agents from unauthorized com-

40-3308. General qualifications, agents and solicitors—other than life insurance agents. (1) For the protection of the people of this state the commissioner shall not issue, continue, or permit to exist any agent or solicitor license as to insurance other than life or disability, except in compliance with this chapter, or as to any individual not qualified therefor as follows:

(a) Must be twenty-one (21) years of age or more, or, if for a solicitor's license, must be at least eighteen (18) years of age.

(b) Must be a resident in and of this state.

(c) If for an agent's license, must have been appointed as agent by an authorized insurer, subject to issuance of the license.

(d) If for a solicitor's license, must have been appointed as solicitor by a licensed agent, subject to issuance of the license, and intend to make and make the soliciting of insurance a principal vocation.

(e) Must be competent, trustworthy and of good reputation.

(f) Must have had experience or training or be otherwise qualified in the kind or kinds of insurance as to which he is to be licensed, and be reasonably familiar with the provisions of this code which govern his operations as an insurance agent or solicitor.

(g) Must pass any written examination for the license required under this chapter.

(h) Must intend in good faith to act as, and must act as and hold himself out to be an agent or solicitor in the active solicitation and negotiation of insurance with the general public; and not seek or use the license for the negotiation or effectuation of insurance on his own property or interests or those of his relatives or of his employer. If during any calendar year more than thirty-five per cent (35%) of the commissions earned or prospectively to be earned by such an applicant or licensee have been, or probably will be, derived from insurance of his own property or interests and those of his relatives and of his employer, the license will be deemed to have been used or to be intended to be used in violation of this subdivision (h).

(2) In determining the qualifications as to competence, training, experience and knowledge of the provisions of this code governing his operations as an insurance agent or solicitor, as provided for in subsection (1) above, of applicant agents or solicitors proposing to represent as such only insurers who confine their business in this state substantially to the insuring of the property, interests and risks of farmers, the commissioner shall relate such

qualifications only to the kinds of insurance policies which the applicant will handle as such a licensee.

History: En. Sec. 152, Ch. 286, L. 1959.

40-3309. General qualification for license as life or disability insurance agent. For the protection of the people of this state the commissioner shall not issue, continue, or permit to exist any agent license as to life or disability insurance except in compliance with this chapter or as to any individual not qualified therefor as follows:

(1) Must be eighteen (18) years of age, or more.

(2) Must be a resident in and of this state; or of another state, if by reciprocal arrangements made by the commissioner with such other state similar privileges therein are granted to residents of this state. As a part of any such arrangements the commissioner shall be constituted as the attorney-in-fact of any such nonresident for acceptance of service of process in any action or proceeding in this state arising out of or related to the transactions of the licensee in this state, with the same effect as though served upon the licensee personally in this state, and any license issued to or accepted by any such nonresident shall be subject to this condition.

(3) Must have been appointed as such an agent by an authorized insurer, subject to issuance of the license.

(4) Must be competent, trustworthy and of good reputation.

(5) Must have had experience or training or be otherwise adequately qualified in the kind or kinds of insurance as to which he is to be licensed, be reasonably familiar with the provisions of this code governing his operations as such an agent, and with the provisions of the policies and contracts he proposes to offer under the license.

(6) Must pass any written examination for the license required under this chapter.

(7) Must not use or intend to use the license principally for the writing of insurance on the lives or interests of himself or his relatives to the second degree.

(8) Must not be a funeral director, undertaker or mortician, or an officer, employee or representative thereof.

History: En. Sec. 153, Ch. 286, L. 1959.

40-3310. Licensing of firms and corporations. (1) A firm or corporation shall be licensed only as an agent. If a firm, each general partner and each other individual to act for the firm under the license, and if a corporation, each individual to act for the corporation under the license, shall be named in the license and shall qualify therefor as though an individual licensee. The commissioner shall charge and the licensee shall pay a full additional license fee as to each respective individual so named in such license in excess of two.

(2) A license shall not be issued to a firm or corporation unless organized under the laws of this state and maintaining its principal place of business in this state, and unless the transaction of business under the license is within the purposes stated in the firm's partnership agreement or the corporation's articles.

(3) The licensee shall promptly notify the commissioner of all changes among its members, directors, and officers and of any other individual designated in the license.

History: En. Sec. 154, Ch. 286, L. 1959.

40-3311. Licensing of agents' association. (1) The commissioner may license as an agent as to kinds of insurance other than life and disability, any association of licensed Montana insurance agents, whether or not incorporated, and formed and existing for substantial purposes other than as to such license.

(2) The license shall be used solely for the purpose of enabling any such association to place, as agent, insurance of the properties, interests and risks of the state of Montana and of other public agencies, bodies and institutions, and to receive the customary commission thereon.

(3) Application for the license shall be made in the name of the association by its duly constituted president and secretary, and the license may be issued to the association in its name alone.

(4) The license powers may be exercised by such agents as may be appointed from time to time for the purpose of the association's board of trustees. The association shall forthwith file the names of such appointees with the commissioner. The names of such appointees need not appear in the license.

(5) The fee for such license shall be the same as for the license of an individual agent.

(6) Under the license the association may place insurance with any insurer represented as agent by any member of the association, and without requiring that the association have an appointment as agent by any such insurer; otherwise, the license shall be subject to the same requirements and prohibitions as apply to individual agent licenses.

(7) The commissioner may, after a hearing with notice thereof to the association only (and without notice to the individual officers or members of the association), revoke the license if he finds that continuation thereof is not in the public interest, or for such other applicable grounds as are available under this chapter in the case of individuals licensed as agents.

History: En. Sec. 155, Ch. 286, L. 1959.

40-3312. Application for license. (1) Application for an agent or solicitor license shall be made to the commissioner by the applicant, and be signed and sworn to by the applicant before a notary public or other person authorized by law to take acknowledgments of deeds.

(2) The commissioner shall designate and prepare forms for application for license which shall require full answers to such questions as may reasonably be necessary to determine the applicant's identity, residence, personal history, business record, experience and training in insurance, purpose for which the license is to be used and other facts as required by the commissioner to determine whether the applicant meets the applicable qualifications for the license applied for.

(3) If for an agent's license, the application shall state the kinds of insurance proposed to be transacted, and be accompanied by written ap-

pointment of the applicant as agent by an authorized insurer, subject to issuance of the license.

(4) If for a solicitor's license, the application shall be accompanied by written appointment of applicant as solicitor by a licensed agent, subject to issuance of the license.

(5) If the applicant for an agent license is a firm or corporation, the application shall show, in addition, the names of all members, officers and directors, and shall designate each individual who is to exercise the powers to be conferred by the license upon the firm or corporation. Each such individual so designated shall furnish information as to himself, as part of the application, as though for an individual license.

(6) If the applicant for an agent license is an agents' association pursuant to section 40-3311, the application shall show the names and residence addresses of the association's officers and trustees.

(7) If for license as either agent or solicitor, the application shall also show whether applicant was ever previously licensed to transact any kind of insurance in this state or elsewhere; whether any such license was ever refused, suspended or revoked; whether any insurer, general agent or agent (in the case of a solicitor application) claims applicant to be indebted to it, and if so the details thereof and the defenses, if any, of the applicant thereto; whether applicant ever had an agency contract canceled, and the facts thereof; and if applicant is a married woman, like information with respect to her husband.

(8) The commissioner shall require as part of the application for license the certificate of an officer or representative of the insurer proposed to be represented (in the case of applicants for license as agent), or of the proposed employing agent (in the case of applicants for license as solicitor) as to whether the applicant is known to him, whether the insurer or agent has investigated the character and business record of the applicant and the uses to be made of the license, if granted, and his opinion, based on such investigation, as to applicant's trustworthiness and competence and whether the applicant will use the license principally for the purpose of insuring his own risks or interests and those of his relatives or employer.

(9) All such applications shall be accompanied by the applicable license fee, appointment of agent fee where applicable, examination fee where required under section 40-3313, all in the respective amounts stated in section 40-2726 (fees and licenses).

History: En. Sec. 156, Ch. 286, L. 1959.

40-3313. Examination. (1) After completion and filing of the application for license as required under section 40-3312, the commissioner shall subject each applicant for license as agent or solicitor (unless exempted therefrom under subsection (5) below) to a personal written examination as to his competence to act as such agent or solicitor.

(2) If the applicant is a firm or corporation, the examination shall be so taken by each individual who is to be named in the license as having authority to act for the applicant in its insurance transactions under the license.

(3) Examination of an applicant for an agent's license shall cover all of the kinds of insurance for which the applicant has applied to be licensed, as constituted by any one or more of the following classifications:

- (a) Life insurance;
- (b) Disability insurance;
- (c) Property insurance;
- (d) Casualty insurance;
- (e) Vehicle insurance;
- (f) Surety insurance.

For the purposes of this provision "marine" insurance shall be deemed to be included in "property" insurance.

(4) Examination of an applicant for a solicitor's license shall cover all the kinds of insurance, other than life, as to which the appointing agent is licensed.

(5) This section shall not apply to, and no such examination shall be required of:

(a) Any individual lawfully licensed as an agent or solicitor as to the kind or kinds of insurance to be transacted as of or immediately prior to the effective date of this code, and thereafter continuing to be so licensed.

(b) Any applicant for license covering the same kind or kinds of insurance as to which the applicant was licensed in this state, other than under a temporary license, within the twelve (12) months next preceding date of application, unless such previous license was suspended, revoked or continuation thereof refused by the commissioner.

(c) Nonresident applicants for license as life insurance agents under section 40-3309 (2), if such applicant has already taken and successfully passed a similar examination for a similar license in the state of his residence, or is a licensed life insurance agent in such state and become so licensed prior to the time that such an examination was required in such state, and if under the reciprocal arrangements referred to in section 40-3309 (2) a like exemption is granted by such other state as to residents of this state applying for license as life insurance agent in such other state.

(d) All applicants for license as agent for an insurer that confines its business in this state substantially to the insuring of the property, interests and risks of farmers, if exempted from examination by the commissioner, in his discretion, upon written request of the insurer.

(e) Transportation ticket agents of common carriers applying for license to solicit and sell only:

- (i) Accident insurance ticket policies, or
- (ii) Insurance of personal effects while being carried as baggage on such common carrier, as incidental to their duties as such transportation ticket agents.
- (f) Agents' associations applying for license under section 40-3311.
- (g) Title insurance agents.

History: En. Sec. 157, Ch. 286, L. 1959.

40-3314. Conduct of examinations. (1) The commissioner shall make any examination required under section 40-3313 available to applicants with

reasonable frequency, and at place in this state reasonably accessible to such applicants. The commissioner shall make any such examination available at his offices at Helena, Montana, on each business day.

(2) All the kinds of insurance or class thereof, as referred to in section 40-3313 (3), which the applicant proposes to transact under the license applied for, shall be included in the same examination.

(3) The commissioner shall give, conduct and grade all examinations in a fair and impartial manner, and without unfair discrimination as between individuals examined.

(4) The commissioner may require a reasonable waiting period before re-examination of an applicant who has failed to pass a previous examination covering the same kind or kinds of insurance.

History: En. Sec. 158, Ch. 286, L. 1959.

40-3315. Issuance of license, and contents. (1) The commissioner shall promptly issue licenses applied for to persons qualified therefor in accordance with this chapter.

(2) The license shall state the name and address of the licensee, date of issue, general conditions relative to expiration or termination, kind or kinds of insurance covered and the other conditions of the license.

(3) If the license is as agent for life and/or disability insurance only, the license shall state the name of the insurer to be so represented; if the license is as agent for any other kind or kinds of insurance it shall not state the name of any insurer to be so represented.

(4) If the licensee agent is a firm or corporation the license shall also state the name of each individual authorized thereunder to exercise the license powers.

(5) If the licensee is a solicitor the license shall state the name and address of the agent to be represented.

History: En. Sec. 159, Ch. 286, L. 1959.

40-3316. Number of licenses, agents. (1) An agent licensed as to kinds of insurance other than life and/or disability insurance only, is required to have but one license covering the kinds of insurance to be transacted by him regardless of the number of insurers by whom he is appointed as agent, and the same license may include both life insurance and disability insurance.

(2) As to agents licensed as to life and/or disability insurance only, the agent shall have one license for each such insurer to be represented as agent.

(3) A life insurance agent may concurrently be licensed as to an additional life insurer or insurers upon due application, appointment and qualification. Upon request therefor filed with the commissioner by the insurer, the commissioner shall notify a life insurer thereof whenever any of its agents licensed as such in this state has been likewise licensed as to another life insurer.

History: En. Sec. 160, Ch. 286, L. 1959.

40-3317. Appointment of agents—continuation and termination. (1) Each insurer appointing an agent in this state as to property or casualty

or surety insurance shall file with the commissioner the appointment, specifying the kinds of insurance to be transacted by the agent for the insurer, and pay the fee therefor as stated in section 40-2726. If the appointment includes casualty insurance, the agent may be appointed by the same insurer also as to disability insurance without requiring an additional appointment or appointment fee.

(2) Subject to annual continuation by the insurer not later than May 31, each such appointment shall remain in effect until the agent's license is revoked or otherwise terminated, unless written notice of earlier termination of the appointment is filed with the commissioner by the insurer or agent.

(3) Annually, prior to May 1, each insurer shall file with the commissioner an alphabetical list in duplicate of the names and addresses of all its agents whose appointments in this state are to remain in effect, accompanied by payment of the annual continuation of appointment fee as provided in section 40-2726. At the same time the insurer shall also file with the commissioner an alphabetical list in duplicate of the names and addresses of all its agents whose appointments in this state are not to remain in effect.

(4) Subject to the agent's contract rights, an insurer may terminate an agency appointment at any time. The insurer shall promptly give written notice of such termination to the commissioner, and to the agent where reasonably possible. The commissioner may require of the insurer reasonable proof that the insurer has given such notice to the agent.

(5) As part of the notice of termination given the commissioner, the insurer shall file with the commissioner a statement of the facts relative to the termination and the cause thereof. Any information or statement contained in the notice of termination shall be privileged and shall not be admissible as evidence in any action or proceeding against the insurer or any representative thereof by or in behalf of any person affected by such termination.

History: En. Sec. 161, Ch. 286, L. 1959.

Collateral References

Knowledge of other party, or opportunity to know, limitations of agent's actual authority as affecting statutory declaration that one who does certain prescribed

acts for insurance company shall be deemed as acting as its agent. 88 ALR 291.

Right to terminate agent's employment because of his illness or physical incapacity. 21 ALR 2d 1247.

40-3318. Rights of agent following termination of appointment. (1) Following termination of any such agency appointment as to property, casualty or surety insurance, and subject to the terms of any agreement between the agent and the insurer, the agent may continue to service, and receive from the insurer commissions or other compensation relative to, business written by him for the insurer during the existence of the appointment.

(2) This section does not apply as to agents of direct writing insurers or agents or insurers between whom the relationship of employer and employee exists.

History: En. Sec. 162, Ch. 286, L. 1959.

Collateral References

Duty of insurer to give notice of termination of agency. 14 ALR 846.

40-3319. Temporary agent licenses. (1) The commissioner may issue a temporary license as agent to or with respect to an individual qualified therefor only as to age, residence and trustworthiness, and without requiring such individual to take an examination, in the following cases:

(a) To the surviving spouse or next of kin or to the administrator or executor, or the employee of such administrator or executor, of a licensed agent becoming deceased.

(b) To the spouse, next of kin, employee or legal guardian of a licensed agent disabled by sickness, injury or insanity.

(c) To an employee of a firm, or officer or employee of a corporation, licensed as agent, upon the death or disability of an individual designated in the license to exercise the powers thereof.

(d) To the designee of a licensed agent entering upon active service in the armed forces of the United States of America.

(e) Upon request of the insurer, to an applicant for license as a life insurance agent, pending the taking of any examination required of the applicant by the commissioner under section 40-3313, if the applicant is duly enrolled in and is actively pursuing an adequate course of instruction, as provided by or through the insurer, in preparation for such examination. Such license shall be for a period of not over ninety (90) days, or until the applicant has had a reasonable opportunity to take such examination and be informed by the commissioner as to the results thereof, whichever is the shorter period, but subject to extension by the commissioner as provided in subsection (3) below.

(2) The temporary license shall be issued upon application filed with the commissioner in such form and containing such information as the commissioner may reasonably require, and upon payment of the applicable fee as stated in section 40-2726.

(3) The temporary license shall be for a period of not over ninety (90) days, subject to extension by the commissioner in his discretion for an additional period of not more than ninety (90) days; except, that such a license issued pursuant to subdivision (a) above, may be continued without payment of additional fee until the executor or administrator disposes of the insurance business, but not to exceed a period of fifteen (15) months. Temporary license issued to the next of kin under such subdivision (a) shall not be extended for an additional term or terms after appointment and qualification of such an administrator or executor.

(4) The fee paid for the temporary license may be applied upon the fee required for any permanent license issued to the licensee upon or prior to expiration of the temporary license and covering the same kinds of insurance.

History: En. Sec. 163, Ch. 286, L. 1959.

40-3320. Limitations and rights under temporary license. (1) The commissioner shall not issue more than one temporary license, to or with respect to the same individual to be so licensed, within any twelve-month period.

(2) The temporary license may cover the same kinds of insurance for which the agent thereby being replaced was licensed.

(3) As to a temporary agent's license issued on account of the death or disability of an agent, the licensee may so represent all of the insurers last represented by such deceased or disabled agent and without the making of new appointment of such licensee by such insurers; but the licensee shall not be appointed as to any additional insurer or additional kind of insurance under such a temporary license. This provision shall not be deemed to prohibit termination of its appointment by any insurer.

(4) A temporary licensee shall have the same license powers and duties as under a permanent license.

History: En. Sec. 164, Ch. 286, L. 1959.

40-3321. Special requirements as to solicitors. (1) A solicitor shall not be appointed or licensed as to more than one agent.

(2) The solicitor's license shall cover all the kinds of insurance, other than life and disability insurance, for which the appointing agent is licensed; except, that the solicitor's license shall also cover disability insurance where written by a casualty, property, or surety insurer represented by the agent.

(3) A solicitor shall not concurrently be licensed as agent except as to life or disability insurance.

(4) A solicitor shall not have authority to bind risks or countersign policies.

(5) The transactions of a solicitor under his license shall be in the name of the agent by whom appointed, and such agent shall be responsible for the acts or omissions of the solicitor within the scope of his appointment.

(6) The solicitor shall maintain his office with that of the appointing agent, and records of his transactions under the license shall be maintained as a part of the records of such agent.

(7) The solicitor's license shall remain in the custody of the agent by whom appointed. Upon termination of the appointment, the agent shall give written notice thereof to the commissioner and deliver the license to the commissioner for cancellation.

History: En. Sec. 165, Ch. 286, L. 1959.

40-3322. Insurance vending machines. (1) A licensed resident agent may solicit applications for and issue policies of personal travel accident insurance by means of mechanical vending machine supervised by him and placed at airports, railroad stations, bus stations and similar places where transportation tickets are sold and of convenience to the traveling public, if the commissioner finds:

(a) That the policy to be sold provides reasonable coverage and benefits, is reasonably suited for sale and issuance through vending machines, and that use of such a machine therefor in a particular proposed location would be of material convenience to the public;

(b) That the type of vending machine proposed to be used is reasonably suitable and practical for the purpose;

(c) That reasonable means are provided for informing the prospective purchaser of any such policy of the coverage and restrictions of the policy; and

(d) That reasonable means are provided for refund to the applicant or prospective applicant of money inserted in defective machines and for which no insurance, or a less amount than that paid for, is actually received.

(2) As to each such machine to be so used, the commissioner shall issue to the agent a special vending machine license. The license shall specify the name and address of the insurer and agent, the name of the policy to be so sold, the serial number of the machine, and the place where the machine is to be in operation. The license shall be subject to annual continuation, to expiration, suspension or revocation coincidentally with that of the agent. The commissioner shall also revoke the license as to any machine as to which he finds that the conditions upon which the machine was licensed, as referred to in subsection (1), no longer exist. The license fee shall be as stated in section 40-2726 for each license year or part thereof for each respective vending machine. Proof of the existence of a subsisting license shall be displayed on or about each such vending machine in use in such manner as the commissioner may reasonably require.

History: En. Sec. 166, Ch. 286, L. 1959.

Collateral References

Coverage of airplane passenger's trip insurance policy. 25 ALR 2d 1029.

40-3323. Place of business—display of license—records. (1) Every agent shall have and maintain in this state a place of business accessible to the public. Such place of business shall be that wherein the licensee principally conducts transactions under his license. The address of such place shall appear upon the license, and the licensee shall promptly notify the commissioner of any change thereof. Nothing in this section shall be deemed to prohibit maintenance of such place of business in the licensee's place of residence in this state.

(2) The licenses of the licensee, and the licenses of solicitors appointed by and representing the licensee, shall be conspicuously displayed in such place of business in a part thereof customarily open to the public.

(3) The agent shall keep at his place of business complete records pertaining to transactions under his license and the licenses of his solicitors, for a period of at least three (3) years after completion of the respective such transactions.

(4) This section shall not apply as to life and disability insurances.

History: En. Sec. 167, Ch. 286, L. 1959.

40-3324. Reporting and accounting for premiums. (1) All premiums or return premiums received by an agent or solicitor shall be trust funds so received by the licensee in a fiduciary capacity, and the agent or solicitor shall in the applicable regular course of business account for and pay the same to the insured, insurer or agent entitled thereto. If the licensee establishes a separate deposit for funds so belonging to others in order to avoid a commingling of such fiduciary funds with his own funds, he may deposit and commingle in the same such separate deposit all such funds belonging to others so long as the amount of such deposit so held for each respective other person is reasonably ascertainable from the records and accounts of the licensee.

(2) Any agent or solicitor who, not being lawfully entitled thereto, diverts or appropriates such funds or any portion thereof to his own use, shall upon conviction be guilty of larceny and shall be punished as provided by law.

History: En. Sec. 168, Ch. 286, L. 1959.

40-3325. Exchange of business—sharing commissions. (1) An agent may, occasionally only, place an insurance coverage with an insurer as to which he is not then licensed or appointed as an agent, and the insurer shall accept such business, only when placed through a licensed agent, resident in this state, of the insurer. Both agents involved in such an exchange of business must be licensed as to all of the kinds of insurance represented by the coverage so placed.

(2) The agents involved in a lawful exchange of business under subsection (1) above may divide between them the commission or compensation payable on account of such coverage.

(3) No agent or solicitor shall directly or indirectly share his commissions or other compensation received or to be received by him on account of a transaction under his license with any person not also licensed under this chapter as to the same kind or kinds of insurance involved in such transactions, except as provided in section 40-2824 (policies originating outside state, etc.). This provision shall not affect payment of the regular salaries due employees of the licensee, or the distribution in regular course of business of compensation and profits among members or stockholders if the licensee is a firm or corporation, or use of funds for family or personal purposes.

(4) This section does not apply as to those transactions with surplus lines agents which are lawful under section 40-3415 nor as to life or disability insurance placed as provided in section 40-3326.

History: En. Sec. 169, Ch. 286, L. 1959.

40-3326. Life or disability agent may place excess or rejected business. A life or disability insurance agent may from time to time place excess or rejected risks in any other life or disability insurer authorized to transact insurance in this state, with the knowledge and approval of the insurer or insurers as to which the agent is so licensed, and may receive a commission thereon without being required to have a license as to such other insurer.

History: En. Sec. 170, Ch. 286, L. 1959.

40-3327. Adjuster's license — qualifications — catastrophe adjustments.

(1) No person shall in this state act as or hold himself out to be an adjuster unless then licensed therefor under this chapter. Application for license shall be made to the commissioner according to forms as prescribed and furnished by him. The commissioner shall issue the license as to individuals qualified therefor upon payment of the license fee stated in section 40-2726.

(2) To be licensed as an adjuster the applicant must be qualified therefor as follows:

(a) Must be an individual twenty-one (21) years of age or more.
(b) Must be a resident in and of Montana, or resident of another state which will permit residents of Montana regularly to act as adjusters in such other state.

(c) Must be a full-time salaried employee of a licensed adjuster, or a graduate of a recognized law school, or must have had experience or special education or training as to the handling of loss claims under insurance contracts of sufficient duration and extent reasonably to make him competent to fulfill the responsibilities of an adjuster.

(d) Must be of good character and reputation.

(e) Must have and maintain in this state an office accessible to the public and keep therein the usual and customary records pertaining to transactions under the license. This provision shall not be deemed to prohibit maintenance of such office in the home of the licensee.

(3) A firm or corporation, whether or not organized under the laws of this state, may be licensed as an adjuster if each individual who is to exercise the license powers is separately licensed, or is named in the firm or corporation license and is qualified as for an individual license as adjuster. An additional full license fee shall be paid as to each individual in excess of one so named in the firm or corporation license to exercise its powers.

(4) Except, that no such adjuster's license or qualifications shall be required as to any adjuster who is sent into this state by and on behalf of an insurer or adjusting firm or corporation for the purpose of investigating or making adjustments of a particular loss under an insurance policy, or for the adjustment of a series of losses resulting from a catastrophe common to all such losses.

History: En. Sec. 171, Ch. 286, L. 1959.

40-3328. Continuance, expiration of licenses. (1) All solicitor and adjuster licenses issued under this chapter, and all agent licenses as to life and/or disability insurance only, shall continue in force until expired, suspended, revoked or terminated, but subject to payment to the commissioner annually on or before May 1 of the applicable continuation fee as stated in section 40-2726, accompanied by written request for such continuation. Such request for continuation as to agent licenses for life insurance and/or disability insurance only, shall be made by the insurer in the form of an alphabetical list in duplicate of the names and addresses of its agents whose licenses are to be continued in this state, accompanied by payment of the annual continuation fee therefor as provided in section 40-2726. At the same time the insurer shall also file with the commissioner an alphabetical list in duplicate of the names and addresses of all its agents whose licenses in this state are not to remain in effect. Section 40-3317 (5) shall apply as to any licenses so terminated by the insurer. As to a solicitor's license, such request shall be signed by the agent by whom the licensee is employed.

(2) Any license referred to in subsection (1) as to which such fee and request for continuation is not received by the commissioner as required in such subsection (1) shall be deemed to have expired as at mid-

night on May 31 next following. Request for continuation of any such license and/or payment of the continuation fee therefor which is received by the commissioner after such May 1 and prior to the next following June 15, may be accepted and effectuated by the commissioner, in his discretion, if accompanied by an annual continuation fee in twice the amount otherwise required.

(3) The license of an agent as to property or casualty or surety insurance shall continue in force as long as there is in effect as to such agent as shown by the commissioner's records an appointment or appointments, as agent of authorized insurers, covering collectively all of the kinds of insurance included in the agent's license. Upon termination of all of such an agent's agency appointments as to a particular kind of insurance, and failure to secure and file with the commissioner a new appointment as to such kind of insurance within ninety (90) days thereafter, the agent's license shall automatically thereupon expire and terminate as to such kind of insurance and the licensee shall promptly deliver his license to the commissioner for reissuance, without fee or charge, as to the kinds of insurance covered by the agent's remaining appointments.

(4) This section shall not apply to temporary licenses issued under section 40-3319.

History: En. Sec. 172, Ch. 286, L. 1959.

40-3329. Suspension, revocation, refusal of license. (1) The commissioner may suspend for not more than twelve (12) months, or may revoke or refuse to continue any license issued under this chapter or any surplus line agent license if, after hearing held on not less than twenty (20) days advance notice by registered mail of such hearing and of the charges against the licensee given as provided in section 40-2711 (3) to the licensee and to the insurers represented (as to an agent) or to the appointing agent (as to a solicitor), he finds that as to the licensee any one or more of the following causes exist:

(a) For any cause for which issuance of the license could have been refused had it then existed and been known to the commissioner.

(b) For obtaining or attempting to obtain any such license through misrepresentation or fraud.

(c) For violation of or noncompliance with any applicable provision of this code, or for willful violation of any lawful rule, regulation, or order of the commissioner.

(d) For misappropriation or conversion to his own use, or illegal withholding, of moneys or property belonging to policyholders, or insurer, or beneficiaries, or others and received in conduct of business under the license.

(e) Conviction, by final judgment, of a felony involving moral turpitude.

(f) If in the conduct of his affairs under the license the licensee has used fraudulent or dishonest practices, or has shown himself to be incompetent, untrustworthy or a source of injury and loss to the public.

(2) The license of a firm or corporation may be suspended, revoked or refused also for any of such causes as relate to any individual designated in the license to exercise its powers.

History: En. Sec. 173, Ch. 286, L. 1959.

40-3330. Procedure following suspension, revocation. (1) Upon suspension or revocation of any such license the commissioner shall forthwith notify the licensee thereof either in person or by mail addressed to the licensee at his address last of record with the commissioner. Notice by mail shall be deemed effectuated when so mailed. The commissioner shall give like notice to the insurers represented by the agent, in the case of an agent's license, and to the agent by whom appointed in the case of a solicitor's license.

(2) Suspension or revocation of the license of an agent shall automatically revoke or suspend the licenses of all solicitors appointed by him.

(3) The commissioner shall not again issue license under this code to or as to any person whose license has been revoked, until after expiration of one year and thereafter not until such person again qualifies therefor in accordance with the applicable provisions of this code. A person whose license has been revoked twice, shall not again be eligible for any license under this code.

(4) If the license of a firm or corporation is so suspended or revoked, no member of such firm, or officer or director of such corporation, shall be licensed or be designated in any license to exercise the powers thereof during the period of such suspension or revocation, unless the commissioner determines upon substantial evidence that such member, officer or director was not personally at fault and did not acquiesce in the matter on account of which the license was suspended or revoked.

History: En. Sec. 174, Ch. 286, L. 1959.

DECISIONS UNDER FORMER LAW

Damages for Revocation without Notice

In an action by an insurance agent against the state insurance commissioner to recover damages for revoking his license without first giving him notice and a chance to be heard, even though defendant had failed to pursue the steps prescribed by former section 40-1330 in revoking the license, it appearing af-

firmatively that plaintiff had been guilty of rebating, he was at best entitled only to nominal damages, and the judgment for defendant on a directed verdict would not be disturbed on appeal to enable plaintiff to recover merely such damages. *Robb v. Porter et al.*, 65 M 460, 461, 211 P 210.

40-3331. Return of license. (1) All licenses issued under this chapter, although issued and delivered to the licensee agent, solicitor or adjuster, shall at all times be the property of the state of Montana. Upon any expiration, termination, suspension or revocation of the license, the licensee or other person having possession or custody of the license shall forthwith deliver it to the commissioner either by personal delivery or by mail.

(2) As to any license lost, stolen or destroyed while in the possession of any such licensee or person, the commissioner may accept in lieu of return of the license, the affidavit of the licensee or other person responsible

for or involved in the safekeeping of such license, concerning the facts of such loss, theft or destruction.

History: En. Sec. 175, Ch. 286, L. 1959.

CHAPTER 34

UNAUTHORIZED INSURERS AND SURPLUS LINES

- Section 40-3401. Representing or aiding unauthorized insurer prohibited.
 40-3402. Suits by unauthorized insurers prohibited.
 40-3403. Unauthorized insurers process act—title—interpretation.
 40-3404. Commissioner process agent.
 40-3405. Service of process.
 40-3406. Exemptions from service of process provisions.
 40-3407. Defense of action by unauthorized insurer.
 40-3408. Attorneys' fees.
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 40-3410. "Surplus line" insurance.
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 40-3419. Records and annual statement.
 40-3420. Tax on surplus lines.
 40-3421. Penalty for failure to file statement, pay tax.
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 40-3423. Actions against insurer—venue—service of process.
 40-3424. Commissioner appointed process agent—service of process.
 40-3425. Rules and regulations.
 40-3426. Exemptions from surplus line law.
 40-3427. Report and tax of independently procured coverages.

40-3401. Representing or aiding unauthorized insurer prohibited. (1)
 No person shall in this state directly or indirectly act as agent for, or otherwise represent or aid on behalf of another, any insurer not then authorized to transact insurance in this state, in the solicitation, negotiation or effectuation of insurance or of annuity contracts, inspection of risks, fixing of rates, investigation or adjustment of losses, collection of premiums, or in any other manner in the transaction of insurance with respect to subjects of insurance resident, located or to be performed in this state.

(2) This section shall not apply to:

(a) Acceptance of service of process by the commissioner under section 40-3405.

(b) Surplus lines insurance, and other transactions as to which certificate of authority is not required of an insurer as stated in section 40-2802.

(3) Any person violating this section shall upon conviction thereof be guilty of a felony.

History: En. Sec. 176, Ch. 286, L. 1959.

Collateral References

Insurance Ⓒ 27.

44 C.J.S. Insurance § 86.

Personal liability of agents or brokers in respect of policies of foreign insurance companies not authorized to do business in the state. 131 ALR 1079.

What constitutes doing business within state by foreign insurance corporation. 137 ALR 1128.

40-3402. Suits by unauthorized insurers prohibited. As to transactions not permitted under section 40-2802, no unauthorized insurer shall institute or file, or cause to be instituted or filed, any suit, action or proceeding in this state to enforce any right, claim or demand arising out of any insurance transaction in this state, until such insurer has obtained a certificate of authority to transact such insurance in this state.

History: En. Sec. 177, Ch. 286, L. 1959.

Collateral References

Failure to procure license as affecting validity or enforceability of contract. 30 ALR 866.

Subsequent compliance with conditions of doing business in state as affecting enforceability of contract of foreign corporation made before compliance with such conditions. 75 ALR 446.

40-3403. Unauthorized insurers process act—title—interpretation. (1) Sections 40-3403 through 40-3408 constitute and may be cited as the Unauthorized Insurers Process Act.

(2) Such act shall be so interpreted as to effectuate its general purpose to make uniform the law of those states which enact it.

History: En. Sec. 178, Ch. 286, L. 1959.

NOTE.—Uniform State Law. Sections 40-3403 through 40-3408 contain language from the "Uniform Unauthorized Insurers Act" approved by the National Conference of Commissioners on Uniform State Laws in 1938 and adopted in the states of Arkansas, Louisiana, North Carolina, and South Carolina. Similar laws have been

enacted in Alabama, Colorado, Florida, Indiana, Iowa, Massachusetts, Michigan, Nevada, Pennsylvania, Rhode Island, South Dakota, Tennessee, and Vermont.

Cross-Reference

Application of Montana Rules of Civil Procedure to proceedings against unauthorized insurers, sec. 93-2711-7.

40-3404. Commissioner process agent. Delivery, effectuation, or solicitation of any insurance contract, by mail or otherwise, within this state by an unauthorized insurer, or the performance within this state of any other service or transaction connected with such insurance by or on behalf of such insurer, shall be deemed to constitute an appointment by such insurer of the commissioner and his successors in office as its attorney, upon whom may be served all lawful process issued within this state in any action or proceeding against such insurer arising out of any such contract or transaction; and shall be deemed to signify the insurer's agreement that any such service of process shall have the same legal effect and validity as personal service of process upon it in this state.

History: En. Sec. 179, Ch. 286, L. 1959.

40-3405. Service of process. (1) Service of process upon any such insurer pursuant to section 40-3404 shall be made by delivering to and leaving with the commissioner or some person in apparent charge of his office two (2) copies thereof and the payment to him of such fees as may be prescribed by law. The commissioner shall forthwith mail by registered mail one of the copies of such process to the defendant at its principal place of business last known to the commissioner, and shall keep a record of all process so served upon him. Such service of process is sufficient, provided notice of such service and a copy of the process are sent within ten days thereafter by registered mail by plaintiff's attorney to the defendant at its last known principal place of business, and the defendant's receipt or receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and

address of the person to whom the letter is addressed, and the affidavit of the plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow.

(2) Service of process in any such action, suit or proceeding shall in addition to the manner provided in subsection (1) of this section be valid if served upon any person within this state, who in this state on behalf of such insurer is:

(a) Soliciting insurance, or

(b) Making any contract of insurance or issuing or delivering any policies or written contracts of insurance, or

(c) Collecting or receiving any premium for insurance; and a copy of such process is sent within ten (10) days thereafter by registered mail by the plaintiff's attorney to the defendant at the last known principal place of business of the defendant, and the defendant's receipt, or the receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow.

(3) No plaintiff or complainant shall be entitled to a judgment by default under this section until the expiration of thirty (30) days from the date of the filing of the affidavit of compliance.

(4) Nothing in this section contained shall limit or abridge the right to serve any process, notice or demand upon any insurer in any other manner now or hereafter permitted by law.

History: En. Sec. 180, Ch. 286, L. 1959. service of process in action on policy. 44 ALR 2d 416.

Collateral References

Foreign insurance company as subject to

40-3406. Exemptions from service of process provisions. Sections 40-3403, 40-3404 and 40-3405 shall not apply to surplus line insurance lawfully effectuated under this chapter, or to reinsurance, nor to any action or proceeding against an unauthorized insurer arising out of:

(1) Wet marine and transportation insurance.

(2) Insurance on or with respect to subjects located, resident, or to be performed wholly outside this state, or on or with respect to vehicles or aircraft owned and principally garaged outside this state.

(3) Insurance on property or operations of railroads engaged in interstate commerce, or

(4) Insurance on aircraft or cargo of such aircraft, or against liability, other than employer's liability, arising out of the ownership, maintenance, or use of such aircraft, where the policy or contract contains a provision designating the commissioner as its attorney for the acceptance of service of lawful process in any action or proceeding instituted by or on

behalf of an insured or beneficiary arising out of any such policy, or where the insurer enters a general appearance in any such action.

History: En. Sec. 181, Ch. 286, L. 1959.

40-3407. Defense of action by unauthorized insurer. (1) Before an unauthorized insurer shall file or cause to be filed any pleading in any action or proceeding instituted against it under sections 40-3404 and 40-3405 of this chapter, such insurer shall:

(a) Procure a certificate of authority to transact insurance in this state, or

(b) Deposit with the clerk of the court in which such action or proceeding is pending cash or securities or file with such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in such action. The court may in its discretion make an order dispensing with such deposit or bond where the insurer makes a showing satisfactory to the court that it maintains in a state of the United States funds or securities, in trust or otherwise, sufficient and available to satisfy any final judgment which may be entered in such action or proceeding, and that the insurer will pay any final judgment entered therein without requiring suit to be brought on such judgment in the state where such funds or securities are located.

(2) The court in any action or proceeding in which service is made in the manner provided in section 40-3405 may, in its discretion, order such postponement as may be necessary to afford the defendant reasonable opportunity to comply with the provisions of subsection (1) above, and to defend such action.

(3) Nothing in subsection (1), above, is to be construed to prevent an unauthorized insurer from filing a motion to quash or to set aside the service of any process made in the manner provided in section 40-3405 hereof, on the ground either:

(a) That such unauthorized insurer has not done any of the acts enumerated in section 40-3404, or

(b) That the person on whom service was made pursuant to subsection (2) of section 40-3405 was not doing any of the acts therein enumerated.

History: En. Sec. 182, Ch. 286, L. 1959.

40-3408. Attorneys' fees. In any action against an unauthorized insurer under this unauthorized insurers service of process act, if the insurer has failed for thirty (30) days after demand prior to the commencement of the action to make payment in accordance with the terms of the insurance contract, and it appears to the court that such refusal was vexatious and without reasonable cause, the court may allow to the plaintiff a reasonable attorney's fee and include such fee in any judgment that may be rendered in such action. The fee shall not exceed one-third of the amount which the court or jury finds the plaintiff is entitled to recover against the insurer, but in no event shall such fee be less than one hundred dollars (\$100.00). Failure of an insurer to defend any such action shall

be deemed prima facie evidence that its failure to make payment was vexatious and without reasonable cause.

History: En. Sec. 183, Ch. 286, L. 1959.

40-3409. Surplus line insurance law—title. Sections 40-3409 through 40-3426 of this chapter constitute and may be referred to as “The Surplus Line Insurance Law.”

History: En. Sec. 184, Ch. 286, L. 1959.

40-3410. “Surplus line” insurance. If certain insurance coverages cannot be procured from authorized insurers, such coverages, hereinafter designated “surplus lines,” may be procured from unauthorized insurers subject to the following conditions:

(1) The insurance must be procured through a licensed surplus line agent.

(2) The full amount of insurance required must not be procurable, after diligent effort has been made to do so, from among a majority of the insurers authorized to transact and actually writing that kind and class of insurance in this state and the amount of insurance placed in an unauthorized insurer shall be only the excess over the amount procurable from authorized insurers.

(3) The insurance must not be so procured for the purpose of securing advantages either as to:

(a) A lower premium rate than would be accepted by an authorized insurer; or

(b) Terms of the insurance contract.

History: En. Sec. 185, Ch. 286, L. 1959.

40-3411. Agent’s affidavit. At the time of procuring, effecting, and issuing any such insurance, the surplus line agent shall execute an affidavit, in form as prescribed or accepted by the commissioner, setting forth facts referred to in section 40-3410 and file such affidavit with the commissioner. Affidavits filed under this section shall be subject to public inspection unless the commissioner determines that the public interest requires otherwise.

History: En. Sec. 186, Ch. 286, L. 1959.

40-3412. Endorsement of contract. Every insurance contract, cover, note, or certificate of insurance procured and delivered as a surplus line coverage under this law shall be endorsed as having been “issued in an unauthorized insurer under the surplus line insurance law, under agent’s license No. —.” The surplus line agent shall properly fill in and sign the endorsement.

History: En. Sec. 187, Ch. 286, L. 1959.

40-3413. Surplus line insurance valid. Insurance contracts procured as “surplus line” coverages from unauthorized insurers in accordance with this law shall be fully valid and enforceable as to all parties, and shall be given acceptance and recognition in all matters and respects to the same effect as like contracts issued by authorized insurers.

History: En. Sec. 188, Ch. 286, L. 1959.

40-3414. Licensing of surplus line agent—fee—bond. Any person, while licensed as a resident insurance agent of this state as to property, casualty, and surety insurances, and who is deemed by the commissioner to be qualified therefor by insurance experience and to be trustworthy, may be licensed as a surplus line agent as follows:

(1) Application to the commissioner for the license shall be made on forms furnished by the commissioner.

(2) License fee in the amount stated in section 40-2726 shall be paid to the commissioner. The license shall expire on the April 1 next after its date of issue.

(3) Prior to issuance of license the applicant shall file with the commissioner, and thereafter for as long as the license remains in effect he shall keep in force a bond in favor of the state of Montana in the penal sum of two thousand dollars (\$2,000), with authorized corporate sureties approved by the commissioner. The bond shall be conditioned that the agent will conduct business under the license in accordance with the provisions of the surplus lines insurance law and that he will promptly remit the taxes provided by such law. The bond shall not be terminated unless at least thirty (30) days prior written notice thereof is filed with the commissioner.

History: En. Sec. 189, Ch. 236, L. 1959.

Collateral References

Insurance Ⓒ12.

44 C.J.S. Insurance § 85.

40-3415. Agent's authority under license—acceptance of business from other agents. (1) Under a surplus line agent's license the licensee shall have the right to place surplus line coverages, in compliance with the surplus line insurance law, with any foreign or alien insurer or insurers not otherwise authorized to transact insurance in this state, and as to such coverages to act as agent in this state for such insurer or insurers.

(2) The surplus line agent may accept surplus line business from any duly licensed agent of an authorized insurer and may compensate him therefor.

History: En. Sec. 190, Ch. 236, L. 1959.

40-3416. Surplus lines in solvent insurers. A surplus line agent shall not knowingly place surplus line insurance with insurers unsound financially. The agent shall ascertain the financial condition of the unauthorized insurer before placing insurance therewith. The agent shall so insure only either:

(1) With an insurer which is an authorized insurer in at least one state of the United States for the kind of insurance involved, and which, if a stock insurer, has capital stock and surplus of at least three hundred fifty thousand dollars (\$350,000) or, if any other type of insurer, has surplus of at least three hundred fifty thousand dollars (\$350,000); or

(2) With an alien insurer, other than one qualified under subdivision (1) above, which has an established and effective trust fund of at least four hundred thousand dollars (\$400,000) within the United States administered by a recognized financial institution and held for the benefit

of all its policyholders in the United States or policyholders and creditors in the United States.

History: En. Sec. 191, Ch. 286, L. 1959.

40-3417. Evidence of the insurance—changes—penalty. (1) Upon placing a surplus line coverage the surplus line agent shall promptly issue and deliver to the insured evidence of the insurance, consisting either of the policy as issued by the insurer or, if such policy is not then available, a certificate of insurance signed or countersigned by the agent. Such certificate shall show the subject, coverage, conditions and term of the insurance, the premium charged and taxes collected from the insured, and the name and address of the insurer. If the direct risk is assumed by more than one insurer, the certificate shall state the name and address and proportion of the entire direct risk assumed by each such insurer.

(2) If after the issuance and delivery of any such certificate there is any change as to the identity of the insurers, or the proportion of the direct risk assumed by the insurer as stated in the original certificate, or in any other material respect as to the insurance coverage evidenced by the certificate, the agent shall promptly issue and deliver to the insured a substitute certificate accurately showing the current status of the coverage and the insurers responsible thereunder.

(3) If a policy issued by the insurer is not available upon placement of the insurance and the agent has issued and delivered a certificate as hereinabove provided, upon request therefor by the insured the agent shall as soon as reasonably possible procure from the insurer its policy evidencing such insurance and deliver such policy to the insured in replacement of the certificate theretofore issued.

(4) Any surplus line agent who knowingly or negligently issues or delivers a false certificate of insurance, or fails promptly to notify the insured of any material change with respect to such insurance by delivery to the insured of a substitute certificate as provided in subsection (2), shall be guilty of a violation of this code and upon conviction shall be subject to the penalties provided by section 40-2617 or to any greater applicable penalty otherwise provided by law.

History: En. Sec. 192, Ch. 286, L. 1959.

40-3418. Liability of insurer as to losses and unearned premiums. (1) As to a surplus line risk which has been assumed by an unauthorized insurer pursuant to this surplus lines insurance law, and if the premium thereon has been received by the surplus line agent who placed such insurance, in all questions thereafter arising under the coverage as between the insurer and the insured the insurer shall be deemed to have received the premium due to it for such coverage; and the insurer shall be liable to the insured as to losses covered by such insurance, and for unearned premiums which may become payable to the insured upon cancellation of such insurance, whether or not in fact the agent is indebted to the insurer with respect to such insurance or for any other cause. This provision shall not affect rights as between the insurer and the surplus line agent.

(2) Each unauthorized insurer assuming a surplus lines direct risk under this surplus line insurance law shall be deemed thereby to have subjected itself to the terms of this section.

History: En. Sec. 193, Ch. 286, L. 1959.

40-3419. Records and annual statement. (1) Each surplus line agent shall keep a separate record and account of all business transacted under his license, including a copy of each daily report, if any, and of each certificate of insurance issued by him. The records shall be available for examination by the commissioner at any reasonable time within five (5) years after the issuance of the coverage to which it relates.

(2) Prior to April 1 of each year the agent shall file with the commissioner a statement for the calendar year preceding, showing:

(a) Name and address of each insured for whom surplus line insurance was procured;

(b) Name and home office address of each insurer providing such insurance;

(c) Amount of each such coverage, the premium rate and the gross premium charged therefor;

(d) Date and term of the policy;

(e) Amount of premium returned on each policy canceled or not taken; and

(f) Such additional information as the commissioner may reasonably require.

History: En. Sec. 194, Ch. 286, L. 1959.

40-3420. Tax on surplus lines. There is imposed upon premiums collected for surplus line insurance transacted in this state a tax at the same rate and computed in the same manner as provided in section 40-2821 as to premiums of authorized insurers; except that amounts collected from the insured specifically for applicable state and federal taxes, and in excess of the premium otherwise required, shall not be deemed to be part of the premium for the purposes of such computation. Upon filing of the annual statement referred to in section 40-3419 (2) the surplus line agent shall pay to the commissioner the amount of tax owing as to surplus line insurance business transacted by him during the preceding calendar year. If a surplus line policy covers risk or exposures only partially in this state, the tax payable shall be computed upon the proportion of the premium which is properly allocable to the risks or exposures located in this state.

History: En. Sec. 195, Ch. 286, L. 1959.

40-3421. Penalty for failure to file statement, pay tax. Every surplus line agent who fails to make and file the annual statement as required under section 40-3419 or to pay the taxes as required under section 40-3420, shall be liable to a penalty of twenty-five dollars (\$25) for each day of delinquency, commencing with April 1. The tax and penalty may be recovered in an action instituted by the commissioner in the name of the state in any court of competent jurisdiction, the attorney general representing him. The penalty when collected shall be paid to the state treasurer

and placed to the credit of the general fund. The surplus line agent's license shall also be subject to revocation as provided in section 40-3422.

History: En. Sec. 196, Ch. 286, L. 1959.

40-3422. Revocation of agent's license. (1) The commissioner shall revoke or suspend any surplus line agent's license, together with his license as an insurance agent or solicitor:

(a) If the agent fails to file his annual statement or to remit the tax as required by law; or

(b) If the agent fails to keep the records, or to allow the commissioner to examine his records, as required by law; or

(c) If the agent falsifies the affidavit required by section 40-3411; or

(d) For any of the causes for which an insurance agent's license may be revoked.

(2) The procedures provided by section 40-3329 for the suspension or revocation of agents' licenses shall be applicable to suspension or revocation of a surplus line agent's license.

(3) No agent whose license has been so revoked or suspended shall again be so licensed within one year thereafter, nor until all penalties and delinquent taxes owing by him have been paid.

History: En. Sec. 197, Ch. 286, L. 1959.

40-3423. Actions against insurer—venue—service of process. Every unauthorized insurer issuing a surplus line coverage under this surplus line insurance law shall be deemed to be doing business in this state as an unlicensed insurer, and may be sued in this state upon any cause of action arising under any insurance contract so made by it. Such suit shall be brought in the district court of the county wherein the plaintiff resides.

History: En. Sec. 198, Ch. 286, L. 1959.

Cross-Reference

Application of Montana Rules of Civil Procedure to service on surplus line insurers, sec. 93-2711-7.

Collateral References

Insurance⊕618.

46 C.J.S. Insurance § 1252.

40-3424. Commissioner appointed process agent—service of process.

(1) Every surplus line insurer before insuring as such under this law shall in writing appoint the commissioner as its true and lawful attorney upon whom legal process in any action or proceeding against it in this state shall be served; and in such writing shall agree that any such process served upon such attorney shall be of the same legal force and validity as if served in this state upon such insurer, and that such authority shall continue in force so long as any liability remains outstanding against it in this state. At the time of filing such appointment the insurer shall also file designation of the name and address of the person to whom process against it served upon the commissioner is to be forwarded. The insurer may change such designation by a new filing.

(2) Service upon such an insurer shall be made upon the commissioner, and in accordance with the procedures, requirements, and results as provided under section 40-2819.

History: En. Sec. 199, Ch. 286, L. 1959.

Collateral References

Insurance⊕627(2).

46 C.J.S. Insurance § 1270.

40-3425. Rules and regulations. (1) The commissioner shall make or may approve and adopt reasonable rules and regulations, consistent with this surplus line insurance law, for any or all of the following purposes:

(a) Effectuation of such law;
(b) Establishment of procedures through which determination is to be made as to the eligibility of particular proposed coverages for placement with a surplus line insurer or insurers; and

(c) Establishment, procedures, and operations of any voluntary organization of surplus line insurance agents or others designed to assist such agents to comply with such law.

(2) Such rules and regulations shall be subject to the procedures and carry the penalty provided by section 40-2710.

History: En. Sec. 200, Ch. 286, L. 1959.

Collateral References

Insurance \S 18.

44 C.J.S. Insurance \S 78.

40-3426. Exemptions from surplus line law. The provisions of this surplus line insurance law controlling the placing of insurance with unauthorized insurers shall not apply to reinsurance or to the following insurances when so placed by licensed insurance agents of this state:

(1) Wet marine and transportation insurances;

(2) Insurance on subjects located, resident, or to be performed wholly outside of this state, or on vehicles or aircraft owned and principally garaged outside this state;

(3) Insurance on property or operations of railroads engaged in interstate commerce; and

(4) Insurance of aircraft owned or operated by manufacturers of aircraft, or aircraft operated in scheduled interstate flight, or cargo of such aircraft, or against liability, other than workmen's compensation and employers' liability, arising out of the ownership, maintenance or use of such aircraft.

History: En. Sec. 201, Ch. 286, L. 1959.

40-3427. Report and tax of independently procured coverages. (1) Every insured who in this state procures or causes to be procured or continues or renews insurance in an unauthorized foreign insurer, or any self-insurer who in this state so procures or continues excess loss, catastrophe or other insurance, upon a subject of insurance resident, located or to be performed within this state, other than insurance procured through a surplus line agent pursuant to the surplus line insurance law of this state or exempted from such law under section 40-3426, shall within thirty (30) days after the date such insurance was so procured, continued, or renewed, file a written report of the same with the commissioner on forms designated by the commissioner and furnished to such an insured upon request. The report shall show the name and address of the insured or insureds, name and address of the insurer, the subject of the insurance, a general description of the coverage, the amount of premium currently charged therefor, and such additional pertinent information as is reasonably requested by the commissioner. If any such insurance covers also subject of insurance resident, located or to be performed outside this state a

proper pro rata portion of the entire premium payable for all such insurance shall be allocated as to the subjects of insurance resident, located or to be performed in this state, for the purposes of this section.

(2) Any insurance in an unauthorized insurer procured through negotiations or an application in whole or in part occurring or made within or from within this state, or for which premiums in whole or in part are remitted directly or indirectly from within this state, shall be deemed to be insurance procured, or continued or renewed in this state within the intent of subsection (1) above.

(3) For the general support of the government of this state there is levied upon the obligation, chose in action, or right represented by the premium charged or payable for such insurance, a tax at the rate of two per cent (2%) of the gross amount of such premium. The insured shall withhold the amount of the tax from the amount of premium charged by and otherwise payable to the insurer for such insurance, and within thirty (30) days after the insurance was so procured, continued or renewed, and coincidentally with the filing with the commissioner of the report provided for in subsection (1) above, the insured shall pay the amount of the tax to the state treasurer through the commissioner.

(4) If the insured fails to withhold from the premium the amount of tax herein levied, the insured shall be liable for the amount thereof and shall pay the same to the commissioner within the time stated in subsection (3) above.

(5) The tax imposed hereunder if delinquent shall bear interest at the rate of six per cent (6%) per annum, compounded annually.

(6) The tax shall be collectible from the insured by civil action brought by the commissioner.

(7) This section does not abrogate or modify, and shall not be construed or deemed to abrogate or modify, any provision of section 40-3401 (representing or aiding unauthorized insurers prohibited) or 40-3402 (suits by unauthorized insurers prohibited), or any other provision of this code.

(8) This section does not apply as to life or disability insurances.

History: En. Sec. 202, Ch. 286, L. 1959.

CHAPTER 35

TRADE PRACTICES AND FRAUDS

- Section 40-3501. Purposes of trade practices law.
 40-3502. Unfair methods, deceptive acts prohibited.
 40-3503. Misrepresentation, false advertising of policies.
 40-3504. False information, advertising.
 40-3505. "Twisting" prohibited.
 40-3506. False financial statements.
 40-3507. Defamation.
 40-3508. Boycott, coercion and intimidation.
 40-3509. Unfair discrimination—life insurance, annuities, and disability insurance.
 40-3510. Rebates—life, disability and annuity contracts.
 40-3511. Exceptions to discrimination, rebates provision—life, disability, and annuity contracts.
 40-3512. Unfair discrimination, rebates prohibited—property, casualty, surety insurances.
 40-3513. Stock operations and advisory board contracts.

- 40-3514. Desist orders for prohibited practices.
- 40-3515. Procedures as to undefined practices.
- 40-3516. Favored agent or insurer.
- 40-3517. Interlocking ownership, management.
- 40-3518. Political contributions prohibited—penalty.
- 40-3519. Illegal dealing in premiums—improper charges for insurance.
- 40-3520. Fictitious groups.
- 40-3521. Prohibited relations with mortuaries.
- 40-3522. False applications, claims, proofs of loss—penalty.

40-3501. Purposes of trade practices law. The purpose of sections 40-3501 through 40-3515 is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, 79th Congress (ch. 20, 50 U. S. Stat. at Large 33)), by defining, or providing for determination of, all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

History: En. Sec. 203, Ch. 286, L. 1959.

40-3502. Unfair methods, deceptive acts prohibited. No person shall engage in this state in any trade practice which is defined in this chapter as, or determined pursuant to this chapter to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

History: En. Sec. 204, Ch. 286, L. 1959.

44 C.J.S. Insurance §§ 88, 89.
29 Am. Jur. 479, Insurance, § 63.

Collateral References

Insurance⊙28, 29.

40-3503. Misrepresentation, false advertising of policies. No person shall make, issue, circulate, or cause to be made, issued, or circulated, any estimate, circular, or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or make any false or misleading statement as to the dividends or share of surplus previously paid on similar policies, or make any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or use any name or title of any policy or class of policies misrepresenting the true nature thereof.

History: En. Sec. 205, Ch. 286, L. 1959.

Collateral References

Misrepresentations by insurance agent

to applicant, insured, or beneficiary, as basis of action by them, other than on policy itself, or as defense to action against them. 136 ALR 5.

40-3504. False information, advertising. No person shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with

respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading.

History: En. Sec. 206, Ch. 286, L. 1959.

DECISIONS UNDER FORMER LAW

Libel

Newspaper ad warning buyers of life insurance about representations by certain agents and requesting that they report

proposals to insurance commissioner for his opinion was libelous per se. *Professional & Business Men's Life Ins. Co. v. Bankers Life Co.*, 163 F Supp 274, 289.

40-3505. "Twisting" prohibited. No person shall make or issue, or cause to be made or issued, any written or oral statement misrepresenting or making incomplete comparisons as to the terms, conditions, or benefits contained in any policy for the purpose of inducing or attempting or tending to induce the policyholder to lapse, forfeit, surrender, retain, exchange or convert any insurance policy.

History: En. Sec. 207, Ch. 286, L. 1959.

DECISIONS UNDER FORMER LAW

Libel

Where complaint of private corporation, doing a life insurance business, alleged that ad in newspaper was published concerning it and its policy and that the representations were misrepresentations, it was entitled to an opportunity to prove its charges. *Professional & Business Men's Life Ins. Co. v. Bankers Life Co.*, 163 F Supp 274, 276, 290, 291.

Newspaper ad warning buyers of life insurance about representations by certain agents and requesting that they report proposals offered to insurance commissioner for his opinion was libelous per se.

Professional & Business Men's Life Ins. Co. v. Bankers Life Co., 163 F Supp 274, 276, 289.

Parties Protected

Former sections 40-1940 and 40-1941 were designed for the protection of insurance companies as well as for the protection of the public and prohibited interference with contracts of insurance which interference had for its purpose the substitution of a new policy for the one interfered with. *Professional & Business Men's Life Ins. Co. v. Bankers Life Co.*, 163 F Supp 274, 276, 290, 291.

40-3506. False financial statements. (1) No person shall file with any supervisory or other public official, or make, publish, disseminate, circulate or deliver to any person, or place before the public, or cause directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public, any false statement of financial condition of an insurer with intent to deceive.

(2) No person shall make any false entry in any book, report or statement of any insurer with intent to deceive any agent or examiner lawfully appointed to examine into its condition or into any of its affairs, or any public official to whom such insurer is required by law to report, or who has authority by law to examine into its condition or into any of its affairs, or, with like intent, willfully omit to make a true entry of any material fact pertaining to the business of such insurer in any book, report or statement of such insurer.

History: En. Sec. 208, Ch. 286, L. 1959.

40-3507. Defamation. No person shall make, publish, disseminate, or circulate, directly or indirectly, or aid, abet or encourage the making, publishing, disseminating or circulating of any oral or written statement or any pamphlet, circular, article or literature which is false, or maliciously

critical of or derogatory to the financial condition of an insurer, or of an organization proposing to become an insurer, and which is calculated to injure any person engaged or proposing to engage in the business of insurance.

History: En. Sec. 209, Ch. 286, L. 1959.

40-3508. Boycott, coercion and intimidation. No person shall enter into any agreement to commit, or by any concerted action commit, any act of boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance.

History: En. Sec. 210, Ch. 286, L. 1959.

40-3509. Unfair discrimination—life insurance, annuities, and disability insurance. (1) No person shall make or permit any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract.

(2) No person shall make or permit any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium, policy fees, or rates charged for any policy or contract of disability insurance or in the benefits payable thereunder, or in any of the terms or conditions of such contract, or in any other manner whatever.

History: En. Sec. 211, Ch. 286, L. 1959.

Collateral References

Insurance—28, 184.

44 C.J.S. Insurance §§ 86, 342.

29 Am. Jur. 476, Insurance, § 60.

Flat life insurance premium rate regardless of age, or failure to apply rate

applicable according to age, as discrimination. 84 ALR 525.

Right of insurer, as affected by statute against discrimination, to reformation of policy or other relief because of its own error, not due to misrepresentation by insured, in computing premiums, indemnity, or other benefit or option under policy. 125 ALR 1058, 1066.

40-3510. Rebates—life, disability and annuity contracts. Except as otherwise expressly provided by law, no person shall knowingly permit or offer to make or make any contract of life insurance, life annuity or disability insurance, or agreement as to such contract other than as plainly expressed in the contract issued thereon, or pay or allow, or give or offer to pay, allow, or give, directly or indirectly, as inducement to such insurance, or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any paid employment or contract for services of any kind, or any valuable consideration or inducement whatever not specified in the contract; or directly or indirectly give, or sell, or purchase or offer or agree to give, sell, purchase, or allow as inducement to such insurance or annuity or in connection therewith, and whether or not to be specified in the policy or contract, any agreement of any form or nature promising returns and profits, or any stocks, bonds, or other securities, or interest present or contingent therein or as measured thereby, of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued or to accrue thereon; or offer, promise or give anything of value whatsoever not specified in the contract.

History: En. Sec. 212, Ch. 286, L. 1959.

Offering rebate or other financial benefit as ground for cancellation of agent's license. 154 ALR 1154.

Collateral References

29 Am. Jur. 476, Insurance, § 60.

40-3511. Exceptions to discrimination, rebates provision—life, disability, and annuity contracts. Nothing in sections 40-3509 and 40-3510 shall be construed as including within the definition of discrimination or rebates any of the following practices:

(1) In the case of any contract of life insurance or life annuity, paying bonuses to policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance, provided that any such bonuses, or abatement of premiums shall be fair and equitable to policyholders and for the best interests of the insurer.

(2) In the case of life insurance policies issued on the industrial debit, pre-authorized check, bank draft, or similar plans, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer or by pre-authorized check, bank draft, or similar plans, in an amount which fairly represents the saving in collection expense.

(3) Readjustment of the rate of premium for a group insurance policy based on the loss or expense experience thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year.

(4) Reduction of premium rate for policies of large amount, but not exceeding savings in issuance and administration expenses reasonably attributable to such policies as compared with policies of similar plan issued in smaller amounts.

(5) Issuing life or disability insurance policies on a salary savings or payroll deduction plan at reduced rate reasonably commensurate with the savings made by the use of such plan.

History: En. Sec. 213, Ch. 286, L. 1959.

statutory prohibition of rebate, remission, refund, or other discrimination in respect of premiums. 137 ALR 1029.

Collateral References

Dividends on policies as violation of

40-3512. Unfair discrimination, rebates prohibited—property, casualty, surety insurances. (1) No property, casualty or surety insurer or any employee or representative thereof, and no agent, or solicitor shall pay, allow, or give, or offer to pay, allow or give, directly or indirectly, as an inducement to insurance, or after insurance has been effected, any rebate, discount, abatement, credit or reduction of the premium named in the policy of insurance, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy, except to the extent provided for in an applicable filing with the commissioner as provided by law.

(2) No insured named in a policy, nor any employee of such insured shall knowingly receive or accept directly or indirectly, any such rebate, discount, abatement, credit or reduction of premium, or any such special favor or advantage or valuable consideration or inducement.

(3) No such insurer shall make or permit any unfair discrimination between insureds or property having like insuring or risk characteristics,

in the premium or rates charged for insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the insurance.

(4) Nothing in this section shall be construed as prohibiting the payment of commissions or other compensation to duly licensed agents, or solicitors, or as prohibiting any insurer from allowing or returning to its participating policyholders, members or subscribers, lawful dividends, savings or unabsorbed premium deposits.

History: En. Sec. 214, Ch. 286, L. 1959.

Collateral References

29 Am. Jur. 476, Insurance, § 60.

Flat life insurance premium rate regardless of age, or failure to apply rate applicable according to age, as discrimination. 84 ALR 525.

Right of insurer, as affected by statute against discrimination, to reformation of policy or other relief because of its own

error, not due to misrepresentation by insured, in computing premiums, indemnity, or other benefit or option under policy. 125 ALR 1058, 1066.

Dividends on policies as violation of statutory prohibition of rebate, remission, refund, or other discrimination in respect of premiums. 137 ALR 1029.

Offering rebate or other financial benefit as ground for cancellation of agent's license. 154 ALR 1154.

DECISIONS UNDER FORMER LAW

Rebate of Commission

A fire insurance solicitor who, pursuant to an agreement with an agent of the owner of a business block, paid over to the agent two-thirds of the commission earned

by him in writing the insurance upon such block, was guilty of "rebating" under former section 40-1327. *Smith v. Kleinschmidt*, 57 M 237, 187 P 894.

40-3513. Stock operations and advisory board contracts. No person shall issue or deliver or permit its agents, officers, or employees to issue or deliver, agency company stock or other capital stock, or benefit certificates or shares in any common-law corporation, or any advisory board contract or other similar contract of any kind promising returns and profits as an inducement to insurance.

History: En. Sec. 215, Ch. 286, L. 1959.

40-3514. Desist orders for prohibited practices. (1) If, after a hearing thereon of which notice of such hearing and of the charges against him were given such person, the commissioner finds that any person in this state has engaged or is engaging in any act or practice defined in or prohibited under this chapter, the commissioner shall order such person to desist from such acts or practices.

(2) Such desist order shall become final upon expiration of the time allowed for appeals from the commissioner's orders, if no such appeal is taken, or, in event of such an appeal, upon final decision of the court if the court affirms the commissioner's order or dismisses the appeal. An intervenor in such hearing shall have the right to appeal as provided in section 40-3515 (3).

(3) In event of such an appeal, to the extent that the commissioner's order is affirmed the court shall issue its own order commanding obedience to the terms of the commissioner's order.

(4) No order of the commissioner pursuant to this section or order of court to enforce it shall in any way relieve or absolve any person affected by such order from any other liability, penalty, or forfeiture under law.

(5) Violation of any such desist order shall be deemed to be and shall be punishable as a violation of this code.

(6) This section shall not be deemed to affect or prevent the imposition of any penalty provided by this code or by other law for violation of any other provision of this chapter, whether or not any such hearing is called or held or such desist order issued.

History: En. Sec. 216, Ch. 286, L. 1959. Procedure to proceedings to restrain unlawful practices, sec. 93-2711-7.

Cross-Reference

Application of Montana Rules of Civil

40-3515. Procedures as to undefined practices. (1) If the commissioner believes that any person engaged in the insurance business is engaging in this state in any method of competition or in any act or practice in the conduct of such business which is not defined in this chapter, but that such method of competition is unfair or that such act or practice is unfair or deceptive and that a proceeding by him in respect thereto would be in the public interest, he shall, after a hearing of which notice of the hearing and of the charges against him are given such person, make a written report of his findings of fact relative to such charges and serve a copy thereof upon such person and any intervenor at the hearing.

(2) If such report charges a violation of this chapter and if such method of competition, act or practice has not been discontinued, the commissioner may, through the attorney general of this state, at any time after the service of such report cause an action to be instituted to enjoin and restrain such person from engaging in such method, act, or practice. In such action the court may grant a restraining order or injunction upon such terms as may be just; but the people of this state shall not be required to give security before the issuance of any such order or injunction. If a stenographic record of the proceedings in the hearing before the commissioner was made, a certified transcript thereof including all evidence taken and the report and findings shall be received in evidence in such action.

(3) If the commissioner's report made under subsection (1) above, or order on hearing made under section 40-3514 does not charge a violation of this chapter, then any intervenor in the proceedings may appeal therefrom within the time and in the manner provided in this code for appeals from the commissioner generally.

History: En. Sec. 217, Ch. 286, L. 1959.

40-3516. Favored agent or insurer. No person shall require as a condition precedent to loaning money upon the security of any real or personal property, or to the selling of any such property under contract, that the owner of the property to whom the money is to be loaned or the vendee of the property so being sold, shall place, continue, or renew any policy of insurance covering or to cover such property, or covering any liability related to such property or the use thereof, through a particular insurance agent or in a particular insurer; except, that this provision shall not prevent the reasonable exercise by any such lender or vendor of the right to approve or disapprove of the insurer selected to underwrite the insurance.

History: En. Sec. 218, Ch. 286, L. 1959.

40-3517. Interlocking ownership, management. (1) Any insurer may retain, invest in or acquire the whole or any part of the capital stock of any other insurer or insurers, or have a common management with any other insurer or insurers, unless such retention, investment, acquisition or common management is inconsistent with any other provision of this code, or unless by reason thereof the business of such insurers with the public is conducted in a manner which substantially lessens competition generally in the insurance business or tends to create a monopoly therein.

(2) Any person otherwise qualified may be director of two or more insurers which are competitors, unless the effect thereof is to lessen substantially competition between insurers generally or tends materially to create a monopoly.

History: En. Sec. 219, Ch. 286, L. 1959.

40-3518. Political contributions prohibited—penalty. (1) No insurer shall directly or indirectly pay or use or offer, consent, or agree to pay, or use any money or property for or in aid of any political party, committee, or organization, or for or in aid of any corporation, or other body organized or maintained for political purposes, or for or in aid of any candidate for political office, or for nomination for such office, or for any political purpose whatsoever, or for the reimbursement or indemnification of any person for money or property so used.

(2) Any officer, director, stockholder, attorney, or agent of any insurer which violates any of the provisions of this section, who participates in, aids, abets, or advises, or consents to any such violation, and any person who solicits or knowingly receives any money or property in violation of this section, shall be guilty of a misdemeanor, and be punished by imprisonment for not more than one year and a fine of not more than one thousand dollars (\$1,000); and any officer or director aiding or abetting in any contribution made in violation of this section shall be liable to the insurer for the amount so contributed.

History: En. Sec. 220, Ch. 286, L. 1959.

Collateral References

Elections↔317.

29 C.J.S. Elections § 329.

40-3519. Illegal dealing in premiums—improper charges for insurance.

(1) No person shall willfully collect any sum as premium or charge for insurance, which insurance is not then provided or is not in due course to be provided (subject to acceptance of the risk by the insurer) by an insurance policy issued by an insurer as authorized by this code.

(2) No person shall willfully collect as premium or charge for insurance any sum in excess of or less than the premium or charge applicable to such insurance, and as specified in the policy, in accordance with the applicable classifications and rates as filed with and approved by the commissioner; or, in cases where classifications, premiums, or rates are not required by this code to be so filed and approved, such premiums and charges shall not be in excess of or less than those specified in the policy and as fixed by the insurer. This provision shall not be deemed to prohibit the charging and collection, by surplus line agents licensed under chapter 34 of this title, of the amount of applicable state and federal taxes in addi-

tion to the premium required by the insurer. Nor shall it be deemed to prohibit the charging and collection, by a life insurer, of amounts actually to be expended for medical examination of an applicant for life insurance or for reinstatement of a life insurance policy.

(3) Each violation of this section shall be punishable under section 40-2617 (general penalty).

History: En. Sec. 221, Ch. 286, L. 1959.

40-3520. Fictitious groups. (1) No insurer, whether an authorized insurer or an unauthorized insurer, shall make available through any rating plan or form, property, casualty or surety insurance to any firm, corporation, or association of individuals, any preferred rate or premium based upon any fictitious group of such firm, corporation, or association of individuals.

(2) No form or plan of insurance covering any group or combination of persons or risks shall be written or delivered within or outside this state to cover persons or risks in this state at any preferred rate or on any form other than as offered to persons not in such group or combination and to the public generally, unless such form, plan of insurance, and the rates or premiums to be charged therefor have been submitted to and approved by the commissioner as being not unfairly discriminatory, and as not otherwise being in conflict with subsection (1) above or with any provision of chapter 36 of this title (rates and rating organizations) to the extent that such chapter 36 is, by its terms, applicable thereto.

(3) This section does not apply to life insurance, disability insurance, or annuity contracts.

History: En. Sec. 222, Ch. 286, L. 1959.

40-3521. Prohibited relations with mortuaries. (1) No life insurer shall own, manage, supervise, operate, or maintain any mortuary, funeral, or undertaking establishment, or permit its officers, employees, or representatives to own, operate, maintain or be employed in any such business.

(2) No life insurer shall contract or agree with any funeral director, mortuary, or undertaker to the effect that such funeral director, undertaker, or mortuary shall conduct the funeral of any person insured by such insurer.

(3) Each violation of this section shall constitute a misdemeanor punishable by a fine of not more than one thousand dollars (\$1,000), or by imprisonment at hard labor for not more than six (6) months, or both such fine and imprisonment in the discretion of the court.

History: En. Sec. 223, Ch. 286, L. 1959.

contracts for the sale or furnishing of burial services and merchandise. 68 ALR 2d 1251.

Collateral References

Validity of statutes regulating pre-need

40-3522. False applications, claims, proofs of loss—penalty. Any solicitor, agent, examining physician, applicant, or other person, who knowingly or willfully makes any false or fraudulent statement or representation in or with reference to any application for insurance; or for the purpose of obtaining any money or benefit, knowingly or willfully presents or causes to be presented a false or fraudulent claim; or any proof in support of

such a claim for the payment of the loss upon a contract of insurance; or prepares, makes, or subscribes a false or fraudulent account, certificate, affidavit or proof of loss, or other document or writing, with intent that the same may be presented or used in support of such a claim, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than two hundred and fifty dollars (\$250) or more than one thousand dollars (\$1,000) or by imprisonment in the county jail for not less than three (3) months or more than six (6) months, or both such fine and imprisonment at the discretion of the court.

History: En. Sec. 224, Ch. 286, L. 1959.

Cross-References

Burning to defraud insurer, sec. 94-506.

False proof of loss, penalty, sec. 94-2202.

Collateral References

Insurance—30, 31.

44 C.J.S. Insurance §§ 89, 90.

29 Am. Jur. 955, Insurance, §§ 688 et seq.

Fraud or misrepresentation by insured's agent after loss as within provision avoiding policy for fraud or attempted fraud of insured. 24 ALR 2d 1220.

Right of life insurer to restitution of payments made because of fraud as to death of insured. 59 ALR 2d 1107.

Applicability of fraud and false swearing clause of fire insurance policy to testimony given at trial. 64 ALR 2d 962.

CHAPTER 36

RATES AND RATING ORGANIZATIONS

- Section 40-3601. Purpose of chapter—interpretation.
- 40-3602. Scope of chapter.
- 40-3603. Rate making bases and standards.
- 40-3604. Rate filings required.
- 40-3605. Filings may be made by bureau.
- 40-3606. Exemption from filing.
- 40-3607. Effective date of filing.
- 40-3608. Disapproval of filing within waiting period.
- 40-3609. Subsequent disapproval of filing.
- 40-3610. Limitation of disapproval power.
- 40-3611. Excess rates.
- 40-3612. Discriminatory, inadequate rates prohibited.
- 40-3613. Commissioner's power to correct improper rates—interpretation of rate standard.
- 40-3614. Rate bureau defined and authorized.
- 40-3615. Rate bureaus—licensing.
- 40-3616. Bureau obligations, limitations as to insurers, members, and subscribers.
- 40-3617. Notice of changes.
- 40-3618. Technical services.
- 40-3619. Stamping bureau.
- 40-3620. Adherence to filings—precedence as between filings.
- 40-3621. Deviations.
- 40-3622. Information, filings from rating organizations.
- 40-3623. Inspections and surveys.
- 40-3624. Insurer "groups"—right to use same rates.
- 40-3625. Advisory organizations.
- 40-3626. Joint underwriting and joint reinsurance.
- 40-3627. Examination of rating bureaus, advisory organizations, joint underwriters and joint reinsurers.
- 40-3628. Dividends not to be regulated.
- 40-3629. Interchange of rating plan data—consultation—co-operative action in rate making.
- 40-3630. Assigned risk plan—casualty and surety.
- 40-3631. False or misleading information.
- 40-3632. Appeal to commissioner as to filing.
- 40-3633. Appeals from the commissioner.

40-3601. Purpose of chapter—interpretation. The purpose of this chapter is to promote the public welfare by regulating insurance rates to the end that they shall not be excessive, inadequate or unfairly discriminatory, and to authorize and regulate co-operative action among insurers in rate making and in other matters within the scope of this chapter. Nothing in this chapter is intended:

- (1) To prohibit or discourage reasonable competition, or
- (2) Prohibit or encourage, except to the extent necessary to accomplish the aforementioned purpose, uniformity in insurance rates, rating systems, rating plans or practices. This chapter shall be liberally interpreted to carry into effect the provisions of this section.

History: En. Sec. 225, Ch. 286, L. 1959.

44 C.J.S. Insurance § 60.

29 Am. Jur. 474, Insurance, § 58.

Collateral References

Insurance 3.

40-3602. Scope of chapter. This chapter applies to all insurers and all kinds of insurance, except that nothing contained in this chapter shall apply to:

- (1) Life insurance.
- (2) Disability insurance.
- (3) Reinsurance, except joint reinsurance as provided in section 40-3626 of this chapter.
- (4) Insurance against loss of or damage to aircraft, their hulls, accessories and equipment, or against liability, other than workmen's compensation and employers' liability, arising out of the ownership, maintenance or use of aircraft.

(5) Insurance of vessels or craft, their cargoes, marine builders' risks, marine protection and indemnity, or other risks commonly insured under marine, as distinguished from inland marine, insurance policies.

- (6) Title insurance.

History: En. Sec. 226, Ch. 286, L. 1959.

40-3603. Rate making bases and standards. (1) All rates shall be made in accordance with the following provisions:

(a) Due consideration shall be given to past and prospective loss experience within and outside this state, to catastrophe hazards, if any, to a reasonable margin for underwriting profit and contingencies, to dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members or subscribers, to past and prospective expenses both countrywide and those specially applicable to this state, and to all other relevant factors within and outside this state.

(b) Rates shall not be excessive, inadequate or unfairly discriminatory.

(c) Rates for casualty insurance to which this chapter applies shall also be subject to the following provisions:

(i) The systems of expense provisions included in the rates for use by any insurer or group of insurers may differ from those of other insurers or groups of insurers to reflect the requirements of the operating methods of any such insurer or group with respect to any kind of insurance, or with respect to any subdivision or combination thereof for which subdivision or combination separate expense provisions are applicable.

(ii) Risks may be grouped by classifications for the establishment of rates and minimum premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which establish standards for measuring variations in hazards or expense provisions, or both. Such standards may measure any differences among risks that can be demonstrated to have a probable effect upon losses or expenses.

(d) Rates for property, marine and inland marine insurance to which this chapter applies shall also be subject to the following provisions:

(i) Manual, minimum, class rates, rating schedules or rating plans, shall be made and adopted, except in the case of specific inland marine rates on risks specially rated.

(ii) Due consideration shall be given to the conflagration and catastrophe hazards, and in the case of fire insurance rates consideration shall be given to the experience of the fire insurance business during a period of not less than the most recent five-year period for which such experience is available.

(2) Except to the extent necessary to meet the provisions of subdivision (b) of this section, uniformity among insurers in any matters within the scope of this section is neither required nor prohibited.

(3) Rates made in accordance with this section may be used subject to the provisions of this chapter.

History: En. Sec. 227, Ch. 286, L. 1959.

40-3604. Rate filings required. (1) Every rating bureau shall file with the commissioner every manual of classifications, rules and rates, every rating plan and every modification of any of the foregoing which it proposes to use for casualty insurance to which this chapter applies.

(2) Every insurer shall file with the commissioner, except as to inland marine risks which by general custom of the business are not written according to manual rates or rating plans, every manual, minimum, class rate, rating schedule or rating plan and every other rating rule, and every modification of any of the foregoing which it proposes to use for fire (except fire on motor vehicles written by casualty insurers), marine and inland marine insurance to which this chapter applies. Specific inland marine rates on risks specially rated, made by a rating organization, shall be filed with the commissioner.

(3) Every such filing shall state the proposed effective date thereof, and shall indicate the character and extent of the coverage contemplated. When a filing is not accompanied by the information upon which the insurer supports such filing, and the commissioner does not have sufficient information to determine whether such filing meets the requirements of this chapter, he shall require such insurer to furnish the information upon which it supports such filing, and in such event the waiting period shall commence as of the date such information is furnished. The information furnished in support of a filing may include:

(a) The experience or judgment of the insurer or rating organization making the filing;

(b) Its interpretation of any statistical data it relies upon;

(c) The experience of other insurers or rating organizations; or

(d) Any other relevant factors.

A filing and any supporting information shall be open to public inspection after the filing becomes effective.

History: En. Sec. 228, Ch. 286, L. 1959.

40-3605. Filings may be made by bureau. An insurer may satisfy its obligation to make the filings referred to in section 40-3604 by becoming a member of, or a subscriber to, a licensed rating organization which makes such filings, and by authorizing the commissioner to accept such filings on its behalf; but nothing contained in this chapter shall be construed as requiring any insurer to become a member of or a subscriber to any rating organization.

History: En. Sec. 229, Ch. 286, L. 1959.

40-3606. Exemption from filing. Under such rules and regulations as he shall adopt the commissioner may, by written order, suspend or modify the requirement of filing as to any kind of insurance, subdivision or combination thereof, or as to classes of risks, the rates for which cannot practicably be filed before they are used. Such orders, rules and regulations shall be made known to insurers and rating organizations affected thereby. The commissioner may make such examination as he may deem advisable to ascertain whether any rates affected by such order are excessive, inadequate or unfairly discriminatory.

History: En. Sec. 230, Ch. 286, L. 1959.

40-3607. Effective date of filing. (1) The commissioner shall review filings as soon as reasonably possible after they have been made in order to determine whether they meet the requirements of this chapter.

(2) Subject to the exceptions specified in subsections (3) and (4) of this section, each filing shall be on file for a waiting period of fifteen (15) days before it becomes effective, which period may be extended by the commissioner for an additional period not to exceed fifteen (15) days if he gives written notice within such waiting period to the insurer or rating organization which made the filing that he needs such additional time for the consideration of such filing. Upon written application by such insurer or rating organization, the commissioner may authorize a filing which he has reviewed to become effective before the expiration of the waiting period or any extension thereof. A filing shall be deemed to meet the requirements of this chapter unless disapproved by the commissioner within the waiting period or any extension thereof.

(3) Specific inland marine rates on risks specially rated by a rating organization shall become effective when filed and shall be deemed to meet the requirements of this chapter until such time as the commissioner reviews the filing and so long thereafter as the filing remains in effect.

(4) Any special filing with respect to a surety or guaranty bond required by law or by court or executive order or by order, rule or regulation of a public body, not covered by a previous filing, shall become effective when filed and shall be deemed to meet the requirements of this chapter until such time as the commissioner reviews the filing and so long thereafter as the filing remains in effect.

History: En. Sec. 231, Ch. 286, L. 1959.

40-3608. Disapproval of filing within waiting period. (1) If within the waiting period or any extension thereof as provided in section 40-3607(2), the commissioner finds that a filing does not meet the requirements of this chapter, he shall send to the insurer or rating organization which made such filing, written notice of disapproval of such filing specifying therein in what respects he finds such filing fails to meet the requirements of this chapter and stating such filing shall not become effective.

(2) If within thirty (30) days after a specific inland marine rate on a risk specially rated by a rating organization subject to section 40-3607 (3) has become effective, or if within thirty (30) days after a special surety or guaranty filing subject to section 40-3607 (4) has become effective, the commissioner finds that such filing does not meet the requirements of this chapter, he shall send to the insurer or rating organization which made such filing written notice of disapproval of such filing specifying therein in what respects he finds that such filing fails to meet the requirements of this chapter and stating when, within a reasonable period thereafter, such filing shall be deemed no longer effective. The disapproval shall not affect any contract made or issued prior to the expiration of the period set forth in the notice.

History: En. Sec. 232, Ch. 286, L. 1959.

40-3609. Subsequent disapproval of filing. If at any time subsequent to the applicable review period provided for in section 40-3608 the commissioner finds that a filing or rate does not meet the requirements of this chapter, he shall, after a hearing held upon not less than twenty (20) days' written notice, specifying the matters to be considered at such hearing, to every insurer and rating organization which made such filing, issue an order specifying in what respects he finds that such filing fails to meet the requirements of this chapter and stating when, within a reasonable period thereafter, such filing shall be deemed no longer effective. Copies of the order shall be sent to every such insurer and rating organization. Such order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in the order.

History: En. Sec. 233, Ch. 286, L. 1959.

40-3610. Limitation of disapproval power. No manual of classification, rules, rating plans, or any modification of any of the foregoing which establishes standards for measuring variations in hazards or expense provisions, or both, in the case of casualty and surety insurance to which this chapter applies, and no manual, minimum, class rate, rating schedule, rating plan or rating rule, or any modification of the foregoing, in the case of property insurance to which this chapter applies, and which has been filed pursuant to the requirements of this chapter shall be disapproved if the rates produced meet the requirements of this chapter.

History: En. Sec. 234, Ch. 286, L. 1959.

40-3611. Excess rates. Upon the written application of the insured, stating his reasons therefor, filed with and approved by the commissioner, a rate in excess of that provided by a filing otherwise applicable may be used on any specific risk.

History: En. Sec. 235, Ch. 286, L. 1959.

40-3612. Discriminatory, inadequate rates prohibited. No insurer making its own rates subject to the provisions of this chapter nor any rating bureau shall fix or charge any rate for insurance upon property in this state which discriminates unfairly between risks in the application of like charges and credits or which discriminates unfairly between risks of essentially the same hazard and having substantially the same degree of protection, nor shall any rate be such as to endanger the solvency of such insurer.

History: En. Sec. 236, Ch. 286, L. 1959.

40-3613. Commissioner's power to correct improper rates—interpretation of rate standard. The commissioner shall have the power at any time on written petition or upon his own motion to review any rate fixed by any insurer making its own rates or by any rating bureau for insurance upon property within this state, for the purpose of determining whether the same is excessive, inadequate or unfairly discriminatory. He shall have the power and authority to order the excessive, inadequate or discriminatory rate removed and fix and order a rate in lieu of the rate made by any such insurer or the bureau rate found to be excessive, inadequate or unfairly discriminatory, and the rate so ordered and fixed shall become the established rate. No rate shall be held to be excessive, inadequate or unfairly discriminatory if the commissioner finds that free competition exists in the area and classification covered by such rate. No rate shall be held to be inadequate unless the commissioner finds that the continued use of such rate shall endanger the solvency of the insurer charging such rate.

History: En. Sec. 237, Ch. 286, L. 1959.

40-3614. Rate bureau defined and authorized. Subject to the provisions of this chapter, two (2) or more admitted insurers, not members of a "group" as referred to in section 40-3624, may act in concert with each other and with others with respect to all matters pertaining to the making of rates, rating plans or rating systems or in the preparation or making of insurance policy or bond forms, underwriting rules, surveys, inspections and investigations or the furnishing of loss or expense statistics or other information and data, or carrying on of research and shall be known as a rating bureau. No insurer or "group" shall be deemed to be a rating organization.

History: En. Sec. 238, Ch. 286, L. 1959.

40-3615. Rate bureaus—licensing. (1) Any corporation, unincorporated association, partnership, or individual, whether located within or outside this state, may make application for and obtain a license as a rating organization. To obtain such a license the applicant shall file with the commissioner:

(a) A copy of its constitution, its articles of agreement or association or its certificate of incorporation, and of its bylaws, rules and regulations governing the conduct of its business;

(b) A list of its members and subscribers;

(c) The name and address of a resident of this state upon whom

notices or orders of the commissioner or process affecting such rating organization may be served; and

(d) A statement of its qualifications as a rating organization.

If the commissioner finds that the applicant meets the licensing requirements of this chapter applicable to it and is trustworthy and competent to act as a rating organization he shall issue a license.

(2) Licenses issued pursuant to this section shall remain in effect for three (3) years unless sooner suspended or revoked by the commissioner. The fee for the license shall be twenty-five dollars (\$25). Such license fee shall be in lieu of all other fees, licenses or taxes to which the rating organization might otherwise be subject.

History: En. Sec. 239, Ch. 286, L. 1959.

40-3616. Bureau obligations, limitations as to insurers, members, and subscribers. A rating organization shall:

(1) Permit any authorized insurer or "group" to obtain and use at its option such rating organizations' rates and rating manuals at a reasonable cost without discrimination and without any requirement to become a member or subscriber;

(2) Permit any authorized insurer or "group" to become a member of or a subscriber to such rating organization or withdraw therefrom;

(3) Neither have nor adopt any rule or exact any agreement, the effect of which would be to require as a condition to membership or subscription that any member or subscriber shall adhere to its rates, rating plans or rating systems;

(4) Neither adopt any rule or exact any agreement the effect of which would be to prohibit or regulate the payment of dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members or subscribers. A plan for the payment of dividends, savings or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members or subscribers shall not be deemed to be a rating plan or system.

History: En. Sec. 240, Ch. 286, L. 1959.

40-3617. Notice of changes. Every rating organization shall notify the commissioner promptly of every change in:

(1) Its constitution, its articles of agreement or association, or its certificate of incorporation, and its bylaws, rules and regulations governing the conduct of its business;

(2) Its list of members and subscribers; and

(3) The name and address of the resident of this state designated by it upon whom notices or orders of the commissioner or process affecting such rating organization may be served.

History: En. Sec. 241, Ch. 286, L. 1959.

40-3618. Technical services. Any rating organization may subscribe for or purchase actuarial, technical or other services, and such services shall be available to all members and subscribers without discrimination.

History: En. Sec. 242, Ch. 286, L. 1959.

40-3619. Stamping bureau. Any fire and marine insurance rating organization may provide for the examination of policies, daily reports, binders, renewal certificates, endorsements or other evidences of insurance, or the cancellation thereof and may make reasonable rules governing their submission. Such rules shall contain a provision that in the event any insurer does not within sixty (60) days furnish satisfactory evidence to the rating organization of the correction of any error or omission previously called to its attention by the rating organization, it shall be the duty of the rating organization to notify the commissioner thereof. All information so submitted for examination shall be confidential.

History: En. Sec. 243, Ch. 286, L. 1959.

40-3620. Adherence to filings—precedence as between filings. As to coverages which are subject to rate filings made under this chapter the insurer shall adhere to and comply with its currently applicable filings and rates.

History: En. Sec. 244, Ch. 286, L. 1959.

40-3621. Deviations. (1) Every member of or subscriber to a rating organization shall adhere to the filings made on its behalf by such organization except that:

(a) In the case of casualty insurance to which this chapter applies any such insurer may make written application to the commissioner for permission to file a uniform percentage decrease or increase to be applied to the premiums produced by the rating system so filed for a kind of insurance, or for a class of insurance which is found by the commissioner to be a proper rating unit for the application of such uniform percentage decrease or increase, or for a subdivision of a kind of insurance (i) comprised of a group of manual classifications which is treated as a separate unit for rate making purposes, or (ii) for which separate expense provisions are included in the filings of the rating organization. Such application shall specify the basis for the modification and shall be accompanied by the data upon which the applicant relies. A copy of the application and data shall be sent simultaneously to such rating organization; and

(b) In the case of fire, marine, and inland marine insurance to which this chapter applies every insurer may make written application to the commissioner for permission to file a deviation from the class rates, schedules, rating plans or rules respecting any kind of insurance, or class of risk within a kind of insurance or combination thereof. Such application shall specify the basis for the deviation and a copy thereof shall be sent simultaneously to such rating organization.

(2) The commissioner shall set a time and place for a hearing on such application at which the insurer and such rating organization may be heard and shall give them not less than ten (10) days' written notice thereof. In the event the commissioner is advised by the rating organization that it does not desire a hearing he may, upon the consent of the applicant, waive such hearing. In considering the application for permission to file such deviation in the case of fire, marine and inland marine insurance, the commissioner shall give consideration to the available statistics and the principles for rate making as provided in section 40-3603. The commis-

sioner shall issue an order permitting the modification for such insurer to be filed if he finds it to be justified and it shall thereupon become effective. He shall issue an order denying such application if he finds that the modification is not justified or that the resulting premiums would be excessive, inadequate or unfairly discriminatory. Each deviation permitted to be filed shall be effective for a period of one (1) year from date of such permission unless terminated sooner with the approval of the commissioner.

History: En. Sec. 245, Ch. 286, L. 1959.

40-3622. Information, filings from rating organizations. The commissioner may in his discretion address inquiries to any individual, association or bureau which is or has been engaged in making rates or estimates for rates as provided for in this chapter in relation to its organization, maintenance, or operation, or any other matter connected with its transactions and shall require the filing of schedules, rates, forms, rules, regulations, and other information; and it shall be the duty of every such individual, association or bureau, or some officer thereof, to promptly make such filing and reply to such inquiries in writing.

History: En. Sec. 246, Ch. 286, L. 1959.

40-3623. Inspections and surveys. Every insurer and rating bureau engaged in making rates or estimates for rates on property in this state shall inspect every risk specially rated by it on schedule and make a written survey of the risk, which shall be filed as a permanent record in the office of the insurer or bureau. A copy of this survey shall be furnished to the owner of the property upon request.

History: En. Sec. 247, Ch. 286, L. 1959.

40-3624. Insurer "groups"—right to use same rates. Two or more insurers who are not members of or subscribers to a rating organization and who by virtue of their business association in the United States represent themselves to be or are customarily known as a "group," or similar insurance trade designation, shall have the right to use the same rates for each such insurer subject to the provisions of this chapter; and nothing contained in this chapter shall be construed to prohibit an agreement to make or use the same rates and concerted actions in connection with such rates by such insurers.

History: En. Sec. 248, Ch. 286, L. 1959.

40-3625. Advisory organizations. (1) Every group, association or other organization of insurers, whether located within or outside this state, which assists insurers which make their own filings or rating organizations in rate making, by the collection and furnishing of loss or expense statistics, or by the submission of recommendations, but which does not make filings under this chapter, shall be known as an advisory organization.

(2) Every advisory organization shall file with the commissioner (a) a copy of its constitution, its articles of agreement or association or its certificate of incorporation and of its bylaws, rules and regulations governing its activities, (b) a list of its members, (c) the name and address of

a resident of this state upon whom notices or orders of the commissioner or process issued at his direction may be served, and (d) an agreement that the commissioner may examine such advisory organization in accordance with the provisions of section 40-3627.

(3) If, after a hearing, the commissioner finds that the furnishing of such information or assistance involves any act or practice which is unfair or unreasonable or otherwise inconsistent with the provisions of this chapter he may issue a written order specifying in what respects such act or practice is unfair or unreasonable or otherwise inconsistent with the provisions of this chapter, and requiring the discontinuance of such act or practice.

(4) No insurer which makes its own filings nor any rating organization shall support its filings by statistics or adopt rate making recommendations, furnished to it by an advisory organization which has not complied with this section or with an order of the commissioner involving such statistics or recommendations issued under subsection (3) of this section. If the commissioner finds such insurer or rating organization to be in violation of this subsection he may issue an order requiring the discontinuance of such violation.

History: En. Sec. 249, Ch. 286, L. 1959.

40-3626. Joint underwriting and joint reinsurance. (1) Every group, association or other organization of insurers which engages in joint underwriting or joint reinsurance, shall be subject to regulation with respect thereto as herein provided, subject, however, with respect to joint underwriting, to all other provisions of this chapter, and, with respect to joint reinsurance, to section 40-3627.

(2) If, after a hearing, the commissioner finds that any activity or practice of any such group, association or other organization is unfair or unreasonable or otherwise inconsistent with the provisions of this chapter, he may issue a written order specifying in what respects such activity or practice is unfair or unreasonable or otherwise inconsistent with the provisions of this chapter and requiring the discontinuance of such activity or practice.

History: En. Sec. 250, Ch. 286, L. 1959.

40-3627. Examination of rating bureaus, advisory organizations, joint underwriters and joint reinsurers. The commissioner shall have the power to examine any such rating bureau, advisory organization, joint underwriters, and joint reinsurers as often as he deems it expedient to do so and shall do so not less than once every three (3) years. A report thereof shall be filed in his office. The commissioner may waive such examination upon the filing with him of a report of an examination made by some other insurance department or proper supervising officer within the three (3) years. The cost of such examination shall be borne by the person so examined. A statement in regard to such examination shall be made in the annual report of the commissioner.

History: En. Sec. 251, Ch. 286, L. 1959.

40-3628. Dividends not to be regulated. Nothing in this chapter shall be construed to prohibit or regulate the payment of dividends, savings, or

unabsorbed premium deposits allowed or returned by insurers to their policyholders, members or subscribers.

History: En. Sec. 252, Ch. 286, L. 1959.

40-3629. Interchange of rating plan data—consultation—co-operative action in rate making. (1) Reasonable rules and plans may be promulgated by the commissioner for the interchange of data necessary for the application of rating plans.

(2) In order to further uniform administration of rate regulatory laws, the commissioner and every insurer and rating organization may exchange information and experience data with insurance supervisory officials, insurers and rating organizations in other states and may consult with them with respect to rate making and the application of rating systems.

(3) Co-operation among rating organizations or among rating organizations and insurers in rate making or in other matters within the scope of this chapter is hereby authorized, provided the filings resulting from such co-operation are subject to all the provisions of this chapter which are applicable to filings generally. The commissioner may review such co-operative activities and practices and if, after a hearing, he finds that any such activity or practice is unfair or unreasonable or otherwise inconsistent with the provisions of this chapter, he may issue a written order specifying in what respects such activity or practice is unfair or unreasonable or otherwise inconsistent with the provisions of this chapter and requiring the discontinuance of such activity or practice.

History: En. Sec. 253, Ch. 286, L. 1959.

40-3630. Assigned risk plan—casualty and surety. Agreements may be made among casualty and surety insurers with respect to the equitable apportionment among them of insurance which may be afforded applicants who are in good faith entitled to but who are unable to procure such insurance through ordinary methods and such insurers may agree among themselves on the use of reasonable rate modification for such insurance, such agreements and rate modifications to be subject to the approval of the commissioner.

History: En. Sec. 254, Ch. 286, L. 1959.

40-3631. False or misleading information. No person shall willfully withhold information from or knowingly give false or misleading information to the commissioner, any rating organization, or any insurer, which will affect the rates or premiums chargeable under this chapter. A violation of this section shall subject the one guilty of such violation to the penalties provided in section 40-2617.

History: En. Sec. 255, Ch. 286, L. 1959.

40-3632. Appeal to commissioner as to filing. Any person aggrieved with respect to any filing which is in effect may make written application to the commissioner for a hearing thereon, except, however, that the insurer or rating organization that made the filing shall not be authorized to proceed under this section. Such application shall specify the grounds to be relied upon by the applicant. If the commissioner finds that the application

is made in good faith, that the applicant would be so aggrieved if his grounds are established, and that such grounds otherwise justify holding such a hearing, he shall, within thirty (30) days after receipt of such application, hold a hearing upon not less than ten (10) days' written notice to the applicant and to every insurer and rating organization which made such filing. If, after such hearing, the commissioner finds that the filing does not meet the requirements of this chapter, he shall issue an order specifying in what respects he finds that such filing fails to meet the requirements of this chapter, and stating when, within a reasonable period thereafter, such filing shall be deemed no longer effective. Copies of the order shall be sent to the applicant and to every such insurer and rating organization. The order shall not affect any contract or policy made or issued prior to the expiration of the period set forth in the order.

History: En. Sec. 256, Ch. 286, L. 1959.

40-3633. Appeals from the commissioner. Any person, insurer or rating organization aggrieved by any order or decision made by the commissioner under this chapter may appeal therefrom to the district court of the county where the aggrieved party may reside, or has his principal place of business in this state, or to the district court of Lewis and Clark County, Montana. The appeal shall be taken within thirty (30) days from the making and filing of the order or decision, by filing in the office of the commissioner a notice of the appeal in writing. The commissioner shall within twenty (20) days after filing of the notice, make and return to the district court a full and complete certified transcript of the finding and order appealed from and of all parts relative thereto on file in his office, including the notice of appeal. Upon the filing of the certified transcript all matters involved therein shall be brought on for trial upon the merits at the next term of the court after the filing of the transcript, unless otherwise ordered by the court. Upon the trial the findings of fact on which the order is based shall be prima facie evidence of the matters therein stated. During the pendency of the proceedings upon review the order of the commissioner shall be suspended, but in the event of a final determination against any insurer, any overcharge by the insurer during review shall be refunded to the persons entitled thereto.

History: En. Sec. 257, Ch. 286, L. 1959.

Cross-Reference

Application of Montana Rules of Civil Procedure to this section, sec. 93-2711-7.

CHAPTER 37

THE INSURANCE CONTRACT

Section 40-3701.	Scope of chapter.
40-3702.	"Policy" defined.
40-3703.	"Premium" defined.
40-3704.	Insurable interest, personal insurance.
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40-3706.	Interest of named insured—property insurance.
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- 40-3711. Application required—life and disability insurance.
- 40-3712. Application as evidence—alteration of application.
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- 40-3716. Standard provisions, in general.
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- 40-3718. Contents of policies in general—identification.
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- 40-3725. Construction of policies.
- 40-3726. Binders.
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- 40-3728. Renewal by certificate.
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- 40-3730. Payment discharges insurer.
- 40-3731. Minor may give acquittance.
- 40-3732. Forms for proof of loss to be furnished.
- 40-3733. Claims administration not waiver.
- 40-3734. Exemption of life insurance proceeds as to creditors.
- 40-3735. Exemption of proceeds, group life.
- 40-3736. Exemption of proceeds, disability insurance.
- 40-3737. Exemption of proceeds, annuity contracts—assignability of rights.

40-3701. Scope of chapter. This chapter shall not apply as to:

- (1) Reinsurance.
- (2) Policies or contracts not issued for delivery in this state nor delivered in this state, except as provided in section 40-3714 (approval of forms for delivery in jurisdictions where local approval not provided for).
- (3) Ocean marine and foreign trade insurances.
- (4) Title insurance, except as to the following provisions:
 - (a) Section 40-3710 (Power to contract, etc.)
 - (b) Section 40-3714 (Filing, approval of forms)
 - (c) Section 40-3715 (Grounds for disapproval)
 - (d) Section 40-3720 (Charter, bylaw provisions)
 - (e) Section 40-3721 (Execution of policies)
 - (f) Section 40-3725 (Construction of policies).

History: En. Sec. 258, Ch. 286, L. 1959.

40-3702. "Policy" defined. "Policy" means the written contract of or written agreement for or effecting insurance, by whatever name called, and includes all clauses, riders, endorsements and papers attached thereto and a part thereof.

History: En. Sec. 259, Ch. 286, L. 1959.

29 Am. Jur. 575, Insurance, §§ 183 et seq.

Collateral References

Insurance—124.

44 C.J.S. Insurance § 223.

Oral contracts of insurance. 15 ALR 995.

DECISIONS UNDER FORMER LAW

Application as Part of Policy

Under former sections 40-401 and 40-403 the application for life insurance was not a part of the policy unless incorporated

therein by reference or otherwise. *Schroeder v. Metropolitan Life Insurance Co.*, 103 M 547, 557, 63 P 2d 1016.

40-3703. "Premium" defined. "Premium" is the consideration for insurance, by whatever name called. Any "assessment," or any "membership," "policy," "survey," "inspection," "service" or similar fee or charge in consideration for an insurance contract is deemed part of the premium.

History: En. Sec. 260, Ch. 236, L. 1959.

44 C.J.S. Insurance § 340.

Collateral References

29 Am. Jur. 820, Insurance, §§ 501 et seq.

Insurance 180.

40-3704. Insurable interest, personal insurance. (1) Any individual of competent legal capacity may procure or effect an insurance contract upon his own life or body for the benefit of any person. But no person shall procure or cause to be procured any insurance contract upon the life or body of another individual unless the benefits under such contract are payable to the individual insured or his personal representatives, or to a person having, at the time when such contract was made, an insurable interest in the individual insured.

(2) If the beneficiary, assignee, or other payee under any contract made in violation of this section receives from the insurer any benefits thereunder accruing upon the death, disablement, or injury of the individual insured, the individual insured or his executor or administrator, as the case may be, may maintain an action to recover such benefits from the person so receiving them.

(3) "Insurable interest" with reference to personal insurance includes only interests as follows:

(a) In the case of individuals related closely by blood or by law, a substantial interest engendered by love and affection.

(b) In the case of other persons, a lawful and substantial economic interest in having the life, health, or bodily safety of the individual insured continue, as distinguished from an interest which would arise only by, or would be enhanced in value by, the death, disablement or injury of the individual insured.

(c) An individual heretofore or hereafter party to a contract or option for the purchase or sale of an interest in a business partnership or firm, or of shares of stock of a closed corporation or of an interest in such shares, has an insurable interest in the life of each individual party to such contract and for the purposes of such contract only, in addition to any insurable interest which may otherwise exist as to the life of such individual.

History: En. Sec. 261, Ch. 236, L. 1959.

Collateral References

Insurance 116.

44 C.J.S. Insurance §§ 199-212.

29 Am. Jur. 799, Insurance, §§ 472 et seq.

Validity of assignment of life insurance policy to one who has no insurable interest in insured. 30 ALR 2d 1310.

Duty of insurer not to issue life policy at instance of one having no insurable interest. 61 ALR 2d 1376.

Insurable interest of partner or partnership in life of partner. 70 ALR 2d 577.

40-3705. Insurable interest, property. (1) No contract of insurance of property or of any interest in property or arising from property shall be enforceable as to the insurance except for the benefit of persons having an insurable interest in the things insured as at the time of the loss.

(2) "Insurable interest" as used in this section means any actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage or impairment.

(3) The measure of an insurable interest in property is the extent to which the insured might be damaged by loss, injury, or impairment thereof.

History: En. Sec. 262, Ch. 286, L. 1959.

Collateral References

Insurance 115.

44 C.J.S. Insurance §§ 175-198, 213-222.

29 Am. Jur. 781, Insurance, §§ 438 et seq.

Extent of recovery by insured who has only a partial or limited interest in the insured property. 68 ALR 1344.

Insurance as covering automobile while being used for illegal purpose. 4 ALR 2d 134.

Amount of insurer's liability as affected by insured's executory contract to sell the property. 8 ALR 2d 1408.

Insurable interest predicated upon invalid or unenforceable contract. 9 ALR 2d 181.

Insurance of bank against larceny and false pretenses. 15 ALR 2d 1006.

Insurable interest of husband or wife in other's property. 27 ALR 2d 1059.

Condemnation proceedings as affecting insurable interest of property owner. 29 ALR 2d 888.

Conditional vendee of insured as within coverage of omnibus clause. 36 ALR 2d 673.

Insurable interest of stockholder in corporation's property. 39 ALR 2d 723.

Lessee's or lessor's right to recover on fire insurance policy for destroyed or damaged property which the other has replaced or repaired. 53 ALR 2d 1383.

Automobile property insurance: sole, unconditional or absolute ownership clause. 71 ALR 2d 223.

DECISIONS UNDER FORMER LAW

Agency for Undisclosed Principal

Where agent for undisclosed principal took title to land and building purchased for principal in his own name and procured fire insurance policies naming himself as the owner and insured, the principal's equitable ownership was an insurable interest, the agent had no insurable interest, and under former section 40-211 the contract of insurance was not enforceable. *Stevens v. Steck*, 101 M 569, 577, 55 P 2d 7.

Undisclosed principal for whom agent had bought land and a building, the agent taking title in his own name with obligation to convey to the principal, had equitable title to the property and therefore an "insurable interest" under former section 40-206. *Stevens v. Steck*, 101 M 569, 577, 55 P 2d 7.

Allegation of Ownership

Complaint in an action to recover on a policy of hail insurance, alleging that plaintiff "had" a certain number of acres of wheat growing was sufficient to show that he was the owner of the crop, and therefore had an insurable interest therein. *Pashierstnik v. Continental Ins. Co.*, 67 M 19, 22, 214 P 603.

Disclosure of Interest to Insurer

Under former section 40-308 information as to the interest of the assured in the property insured, if he was not the absolute owner thereof, had to be supplied

to the insurance company by the applicant as required by former section 40-402. *Stevens v. Steck et al.*, 101 M 569, 576, 55 P 2d 7.

Reserved Right of Possession

Oil companies which sold certain property but reserved possession and use until full payment was made or until operation of property ceased to be profitable had an "insurable interest" in property which could be covered by fire policy, particularly where companies were required to replace property. *Rice Oil Co. et al. v. Atlas Assur. Co. Ltd.*, 102 F 2d 561, 575.

Right of Redemption as Insurable Interest

While after a sale of real property under execution or order of sale, the judgment debtor has no title to the property sold and thereafter his right to redeem is but a personal privilege, such right of redemption is an insurable interest which continues to exist after foreclosure sale and before the time of redemption has expired, which he may assign. If it is assigned, the right to recover for a fire loss sustained during the period covered by the policy passes to the assignee. *Baker v. Pennsylvania Fire Ins. Co.*, 81 M 271, 278, 263 P 93.

When Insurable Interest Held

If one insuring property against fire

has no insurable interest therein the contract is void, and under former section 40-212 an interest insured must exist when

the insurance takes effect and when the loss occurs. *Libby Lbr. Co. v. Pacific States Fire Ins. Co.*, 79 M 166, 174, 255 P 340.

40-3706. Interest of named insured—property insurance. When the name of the person insured is specified in a policy insuring property the insurance can be applied only to his own proper interest.

History: En. Sec. 263, Ch. 286, L. 1959.

Collateral References

Insurance⌚156(1).

44 C.J.S. Insurance § 308.

DECISIONS UNDER FORMER LAW

Undisclosed Principal

Where agent for undisclosed principal purchased land and building in his own name and procured fire insurance policies naming himself as sole owner and insured,

and interest of the principal was not shown as indicated by former sections 40-404 and 40-405, the principal could not enforce the policies. *Stevens v. Steck*, 101 M 569, 578, 55 P 2d 7.

40-3707. Change of interest on death—property insurance. A change of interest, by will or succession, on the death of the insured, does not avoid an insurance of property and the insurance passes to the person taking his interest in the thing insured.

History: En. Sec. 264, Ch. 286, L. 1959.

Disposition of proceeds of insurance on property specifically bequeathed or devised. 35 ALR 2d 1056.

Collateral References

Insurance⌚328(11).

45 C.J.S. Insurance § 565.

40-3708. Transfer of interest between joint insureds—property insurance. A transfer of interest by one of several partners, joint owners, or owners in common, who are jointly insured, to the others, does not avoid an insurance of property even though it has been agreed that the insurance shall cease upon an alienation of the thing insured.

History: En. Sec. 265, Ch. 286, L. 1959.

between themselves, in insurance proceeds. 64 ALR 2d 1402.

Collateral References

Insurance⌚328(3).

45 C.J.S. Insurance § 564.

Right to proceeds of insurance, as between holder of title to real estate and one having option to purchase it. 65 ALR 2d 989.

Rights of vendor and purchaser, as be-

40-3709. Insurance without interest, or of wager, is void. (1) Every stipulation in a policy of insurance of property for the payment of loss without regard to absence of an insurable interest in such property on the part of the insured, or that the policy shall be received as proof of such interest, is void.

(2) Every policy executed by way of gaming or wagering is void.

History: En. Sec. 266, Ch. 286, L. 1959.

Collateral References

Insurance⌚120.

44 C.J.S. Insurance § 175.

40-3710. Power to contract—purchase of insurance by minors. (1) Any person of competent legal capacity may contract for insurance.

(2) Any minor of the age of fifteen (15) years or more, as determined by the nearest birthday, may, notwithstanding his minority, contract for annuities and for insurance upon his own life, body, health, property, liabilities or other interests, or on the person of another in whom the minor

has an insurable interest. Such a minor shall, notwithstanding such minority, be deemed competent to exercise all rights and powers with respect to or under (a) any contract for annuity or for insurance upon his own life, body or health, or (b) any contract such minor effected upon his own property, liabilities or other interests, or on the person of another, as might be exercised by a person of full legal age, and may at any time surrender his interest in any such contracts and give valid discharge for any benefit accruing or money payable thereunder. Such a minor shall not, by reason of his minority, be entitled to rescind, avoid or repudiate the contract, nor to rescind, avoid or repudiate any exercise of a right or privilege thereunder, except that such a minor, not otherwise emancipated, shall not be bound by any unperformed agreement to pay by promissory note or otherwise, any premium on any such annuity or insurance contract.

(3) If any minor mentioned in subsection (2) above, is possessed of an estate that is being administered by a guardian, no such contract shall be binding upon the estate as to payment of premiums, except as and when consented to by the guardian and approved by the probate court of the county in which the administration of the estate is pending, and such consent and approval shall be required as to each annual premium payment.

(4) Any annuity contract or policy of life or disability insurance procured by or for a minor under subsection (2) above, shall be made payable either to the minor or his estate or to a person having an insurable interest in the life of the minor under section 40-3704.

History: En. Sec. 267, Ch. 286, L. 1959.

Collateral References

Right of infant to recover back insurance premiums. 94 ALR 965.

40-3711. Application required—life and disability insurance. No life or disability insurance contract upon an individual, except a contract of group life insurance or of group or blanket disability insurance, shall be made or effectuated unless at the time of the making of the contract the individual insured, being of competent legal capacity to contract, applies therefor or has consented thereto in writing, except in the following cases:

(1) A spouse may effectuate such insurance upon the other spouse.

(2) Any person having an insurable interest in the life of a minor, or any person upon whom a minor is dependent for support and maintenance, may effectuate insurance upon the life of or pertaining to such minor.

(3) Family policies insuring any two or more members of a family may be issued on an application signed by either parent, a stepparent, or by a husband or wife.

History: En. Sec. 268, Ch. 286, L. 1959.

Collateral References

Rights and remedies arising out of delay in passing upon application for insurance. 15 ALR 1026.

Temporary life, accident, or health insurance pending approval of application or issuance of policy. 2 ALR 2d 943.

40-3712. Application as evidence—alteration of application. (1) No application for the issuance of any life or disability insurance policy or annuity contract shall be admissible in evidence in any action relative to

such policy or contract, unless a true copy of the application was attached to or otherwise made a part of the policy or contract when issued. This provision shall not apply to industrial life insurance policies.

(2) If any policy of life or disability insurance delivered in this state is reinstated or renewed, and the insured or the beneficiary or assignee of the policy makes written request to the insurer for a copy of the application, if any, for such reinstatement or renewal, the insurer shall, within thirty (30) days after receipt of such request at its home office or at any of its branch offices, deliver, or mail to the person making such request a copy of such application. If such copy is not so delivered or mailed after having been so requested, the insurer shall be precluded from introducing the application in evidence in any action or proceeding based upon or involving the policy or its reinstatement or renewal. In the case of such request from a beneficiary, the time within which the insurer is required to furnish a copy of such application shall not begin to run until after receipt of evidence satisfactory to the insurer of the beneficiary's vested interest in the policy or contract.

(3) As to kinds of insurance other than life or disability insurance, no application for insurance signed by or on behalf of the insured shall be admissible in evidence in any action between the insured and the insurer arising out of the policy so applied for, if the insurer has failed, at expiration of thirty (30) days after receipt by the insurer of written demand therefor by or on behalf of the insured, to furnish to the insured a copy of such application reproduced by any legible means.

(4) No alteration of any written application for any life or disability insurance policy shall be made by any person other than the applicant without his written consent, except that insertions may be made by the insurer, for administrative purposes only, in such manner as to indicate clearly that such insertions are not to be ascribed to the applicant.

History: En. Sec. 269, Ch. 286, L. 1959.

DECISIONS UNDER FORMER LAW

Application Not Incorporated by Reference

In an action to recover on a life insurance policy, the application for the policy could not, under prior law, be considered

as a part of the contract unless incorporated therein by reference or otherwise. *Schroeder v. Metropolitan Life Insurance Co.*, 103 M 547, 557, 63 P 2d 1016.

40-3713. Representations in applications. All statements and descriptions in any application for an insurance policy or annuity contract, or in negotiations therefor, by or in behalf of the insured or annuitant, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless either:

- (a) Fraudulent; or
- (b) Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
- (c) The insurer in good faith would either not have issued the policy or contract, or would not have issued a policy or contract in as large an amount, or at the same premium or rate, or would not have provided

coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

History: En. Sec. 270, Ch. 286, L. 1959.

Collateral References

Insurance 252-255.

45 C.J.S. Insurance § 473(4).

29 Am. Jur. 955, Insurance, §§ 689 et seq.

Misstatement in description of automobile as affecting automobile policy. 149 ALR 531.

Error in periodic reports required by insurance policy respecting property covered or other insurance in effect, as breach of warranty. 10 ALR 2d 214.

Misrepresentation by applicant for automobile liability insurance as to ownership of vehicle as material to risk. 33 ALR 2d 948.

DECISIONS UNDER FORMER LAW

Agent's Knowledge

Where the agent of an insurance company at the time he wrote a policy insuring the owner of a city building against public liability for injuries suffered therein provided the building was in the care of but a single tenant knew that the premises were occupied by several tenants, his knowledge was imputable to the insurer, his principal, and in the absence of misrepresentations and concealment on the part of the insured, the breach of the single tenancy clause did not void the policy. *Curtis v. Zurich General Accident & Liability Insurance Co. Ltd.*, 108 M 275, 280, 89 P 2d 1038.

Evidence of Fraud

Where attending physician recited in death certificate that he treated insured some six weeks before date of policy and cause of death was heart disease and acute bronchitis, and beneficiary adopted the certificate in making proof of death, the certificate makes out a prima facie case of the truth of the statements, and is sufficient evidence to establish breach of warranty. *Schroeder v. Metropolitan Life Insurance Co.*, 103 M 547, 561, 63 P 2d 1016.

Fraud as Question of Fact

Actual fraud is always a question of fact for the jury, under section 13-310, and unless the condition of the evidence is such that only one inference may be drawn from it, the court may not direct a verdict. *McDonald v. Northern Benefit Association*, 113 M 595, 606, 131 P 2d 479.

Fraud Avoiding Policy

In an action to recover on a death benefit certificate issued by a mutual association, resisted on the ground of falsity of decedent's answers in his application for membership as to freedom from disease and consultation of physicians, etc., under the facts presented plaintiff was not entitled to prevail. *McDonald v. Northern*

Benefit Association, 113 M 595, 598, 131 P 2d 479.

Fraudulent Concealment

If the insured intentionally conceals facts which are material or makes false representations with reference to them, intending to mislead the insurer, he is guilty of actual fraud, which, at the option of the latter, avoids the policy. *Pelican v. Mutual Life Ins. Co.*, 44 M 277, 288, 119 P 778; *McDonald v. Northern Benefit Association*, 113 M 595, 606, 131 P 2d 479.

Material Misrepresentations

In his application for a life insurance policy which provided that the statements of the insured, in the absence of fraud, should be deemed representations and not warranties, the applicant represented that the only illness or disease he had had since childhood was a slight cold, and that he had consulted, or been treated by, only one physician for five years last past. The evidence showed that four months before making these statements on his medical examination he had been treated by two physicians and was present at a consultation respecting his case held between the two and a third, that the treatment was not for a cold but for a serious ulcer of the throat of syphilitic or tubercular nature. Insured died of tubercular laryngitis some four months after issuance of the policy. The representations, accepted and acted upon as true by defendant to its prejudice, were as to material facts affecting the risk, intended to mislead and therefore fraudulent, justifying the insurer in avoiding the policy. *Williams v. Mutual Life Ins. Co. of N. Y.*, 61 M 66, 72, 201 P 320.

By former section 40-505, a statement in an insurance policy of a matter relating to the thing insured, or the risk, as a fact, was made an express warranty, a breach of which in its inception prevented the policy from attaching to the risk. *Weyh et al. v.*

California Ins. Co., 89 M 298, 305, 296 P 1030.

Misrepresentation as to Interest

Since under former section 40-308 a fire insurance policy had to specify the interest of the assured, it was material to the validity of the policy and concealment or misrepresentation of such fact rendered the policy void. *Stevens v. Steck et al.*, 101 M 569, 576, 55 P 2d 7.

Refund of Premiums

In an action to recover back life insurance premiums alleged to have been paid without consideration and under the mistaken idea that the policy was still in force, whereas it had been forfeited for noncompliance with its conditions, the test whether plaintiff can prevail is: could his beneficiary have collected the amount thereof had the insured died in the meantime? *Osborne v. Supreme Lodge etc. Ins. Dept.*, 69 M 361, 368, 222 P 456.

Where there was actual fraud on the part of the decedent in securing membership in a mutual benefit association by reason of false statements made by him in his application therefor, which prevented the membership from ever becoming effective, the association was not required to repay to the beneficiary a certificate fee of \$5 and several monthly assessments of \$1 each paid by decedent prior to his death, as it would have been in case of defaults other than those caused by fraud. *McDonald v. Northern Benefit Association*, 113 M 595, 609, 131 P 2d 479.

"Sound Health" Warranty

The term "sound health" as used in life insurance policy under which insurer may

declare the policy void if insured is not so at date of the issuance of the policy, means freedom from any physical affliction of a serious nature undermining his constitution; does not apply to temporary afflictions; and when stipulated in policy is a warranty in nature of condition precedent requiring strict compliance to justify recovery. *Schroeder v. Metropolitan Life Insurance Co.*, 103 M 547, 557, 63 P 2d 1016.

Warranties

Former section 40-509, providing that a policy of insurance may declare that a violation of specified provisions shall avoid it, otherwise the breach of an immaterial provision does not avoid the policy, refers to provisions other than warranties. *Weyh et al. v. California Ins. Co.*, 89 M 298, 305, 296 P 1030.

By former section 40-505 a statement in an insurance policy of a matter relating to the thing insured, or to the risk, as a fact, was made an express warranty, a breach of which in its inception prevented the policy from attaching to the risk. *Weyh et al. v. California Ins. Co.*, 89 M 298, 305, 296 P 1030.

A "warranty" in a life insurance policy must be part and parcel of the contract—made so by express agreement of the parties upon the face thereof; and where a warranty is found to have been violated it is unnecessary to determine the legal effect of an alleged fraudulent representation appearing in the application for the policy. *Schroeder v. Metropolitan Life Insurance Co.*, 103 M 547, 557, 63 P 2d 1016.

40-3714. Filing, approval of forms. (1) No basic insurance policy or annuity contract form, or application form where written application is required and is to be made a part of the policy or contract, or printed rider or endorsement form or form of renewal certificate, shall be delivered, or issued for delivery in this state, unless the form has been filed with and approved by the commissioner. This provision shall not apply to surety bonds, or to specially rated inland marine risks, nor to policies, riders, endorsements, or form of unique character designed for and used with relation to insurance upon a particular subject, or which relate to the manner of distribution of benefits or to the reservation of rights and benefits under life or disability insurance policies and are used at the request of the individual policyholder, contract holder, or certificate holder. As to forms for use in property, marine (other than ocean marine and foreign trade coverages), casualty and surety insurance coverages the filing required by this subsection may be made by rating organizations on behalf of its members and subscribers; but this provision shall not be deemed to prohibit any such member or subscriber from filing any such forms on its own behalf.

(2) Every such filing shall be made not less than thirty (30) days in advance of any such delivery. At the expiration of such thirty (30) days the form so filed shall be deemed approved unless prior thereto it has been affirmatively approved or disapproved by order of the commissioner. Approval of any such form by the commissioner shall constitute a waiver of any unexpired portion of such waiting period. The commissioner may extend by not more than an additional thirty (30) days the period within which he may so affirmatively approve or disapprove any such form, by giving notice of such extension before expiration of the initial thirty (30) day period. At the expiration of any such period as so extended, and in the absence of such prior affirmative approval or disapproval, any such form shall be deemed approved. The commissioner may at any time, after notice and for cause shown, withdraw any such approval.

(3) Any order of the commissioner disapproving any such form or withdrawing a previous approval shall state the grounds therefor, and the particulars thereof in such details as reasonably to inform the insurer thereof.

(4) The commissioner may, by order, exempt from the requirements of this section for so long as he deems proper any insurance document or form or type thereof as specified in such order, to which, in his opinion, this section may not practicably be applied, or the filing and approval of which are, in his opinion, not desirable or necessary for the protection of the public.

(5) This section shall apply also to any such form used by domestic insurers for delivery in a jurisdiction outside this state, if the insurance supervisory official of such jurisdiction informs the commissioner that such form is not subject to approval or disapproval by such official, and upon the commissioner's order requiring the form to be submitted to him for the purpose. The applicable same standards shall apply to such forms as apply to forms for domestic use.

History: En. Sec. 271, Ch. 286, L. 1959.

Collateral References

Insurance—133(1).

44 C.J.S. Insurance § 253.

Oral contracts of insurance. 15 ALR 995.

Validity, applicability, construction and effect of statutes relating to size or other

characteristics of type or color of printing for insurance policy. 72 ALR 875.

Departure from standard policy as affecting enforceability of policy provision against insurer. 113 ALR 773.

Validity, construction, and effect of approval or disapproval by insurance commissioner of form of policy. 119 ALR 877.

40-3715. Grounds for disapproval. The commissioner shall disapprove any form filed under section 40-3714, or withdraw any previous approval thereof, only if the form:

(1) Is in any respect in violation of or does not comply with this code.

(2) Contains or incorporates by reference, where such incorporation is otherwise permissible, any inconsistent, ambiguous, or misleading clauses, or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract.

(3) Has any title, heading, or other indication of its provisions which is misleading.

(4) Is printed or otherwise reproduced in such manner as to render any provision of the form substantially illegible.

History: En. Sec. 272, Ch. 286, L. 1959.

40-3716. Standard provisions, in general. (1) Insurance contracts shall contain such standard or uniform provisions as are required by the applicable provisions of this code pertaining to contracts of particular kinds of insurance. The commissioner may waive the required use of a particular provision in a particular insurance policy form if:

(a) He finds such provision unnecessary for the protection of the insured and inconsistent with the purposes of the policy, and

(b) The policy is otherwise approved by him.

(2) No policy shall contain any provision inconsistent with or contradictory to any standard or uniform provision used or required to be used, but the commissioner may approve any substitute provision which is, in his opinion, not less favorable in any particular to the insured or beneficiary than the provisions otherwise required.

(3) In lieu of the provisions required by this code for contracts for particular kinds of insurance, substantially similar provisions required by the law of the domicile of a foreign or alien insurer may be used when approved by the commissioner.

(4) No such provision, if required to be contained in the policy, can be waived by agreement between the insurer and any other person.

History: En. Sec. 273, Ch. 286, L. 1959.

Departure from standard policy as affecting enforceability of policy provision against insurer. 113 ALR 773.

Collateral References

Insurance 133.

44 C.J.S. Insurance §§ 251, 255.

40-3717. Policy must contain entire contract. The policy, when issued, shall contain the entire contract between the parties, and neither the insurer or any agent or representative thereof, nor any person insured thereunder, shall make any agreement as to the insurance which is not plainly expressed in the policy. This provision shall not be deemed to prohibit the modification of a policy, after issuance, by written rider or endorsement duly issued by the insurer.

History: En. Sec. 274, Ch. 286, L. 1959.

DECISIONS UNDER FORMER LAW

Agent's Knowledge of Defect

Where the agent of an insurance company at the time he wrote a policy insuring the owner of a city building against public liability for injuries suffered therein provided the building was in the care of but a single tenant knew that the premises were occupied by several tenants, his knowledge was imputable to the insurer, his principal, and in the absence of misrepresentations and concealment on the part of the insured, the breach of the single tenancy clause did not void the policy. *Curtis v. Zurich General Accident & Liability Insurance Co. Ltd.*, 108 M 275, 279, 89 P 2d 1038.

Application Not Part of Contract

The application for a fire insurance policy may not be considered as a part of the contract unless incorporated therein by reference or otherwise. *Schroeder v. Metropolitan Life Insurance Co.*, 103 M 547, 557, 63 P 2d 1016.

Fidelity Insurance

The provision of former section 40-503 that every express warranty made at, or before, the execution of a policy must be contained in the policy itself, or in another instrument signed by the insured and referred to in the policy as making a part of it, was applicable to fidelity or indem-

nity bonds. *Montana A. F. Corp. v. Federal Surety Co.*, 85 M 149, 167, 278 P 116.

Willful Act Exclusion

Where a fire insurance company had not in its policy excepted liability for loss incurred through the burning of the insured property by the insured himself while in-

sane as it could have done, it could not, in reliance on former section 40-604, declaring that the insurer is not liable for a loss caused by the willful act of the insured, assert that it was entitled to an equitable setoff. *Hier v. Farmers Mutual Fire Insurance Co.*, 104 M 471, 487, 67 P 2d 831.

40-3718. Contents of policies in general—identification. (1) Every policy shall specify:

- (a) The names of the parties to the contract.
- (b) The subject of the insurance.
- (c) The risks insured against.
- (d) The time when the insurance thereunder takes effect and the period during which the insurance is to continue.
- (e) The premium.
- (f) The conditions pertaining to the insurance.

(2) If under the policy the exact amount of premium is determinable only at stated intervals or termination of the contract, a statement of the basis and rates upon which the premium is to be determined and paid shall be included.

(3) Subsections (1) and (2) of this section shall not apply as to surety contracts, or to group insurance policies.

(4) All policies and annuity contracts issued by domestic insurers, and the forms thereof filed with the commissioner, shall have printed thereon an appropriate designating letter or figure, or combination of letters or figures or terms identifying the respective forms of policies or contracts, together with the year of adoption of such form. Whenever any change is made in any such form, the designating letters, figures or terms and year of adoption thereon shall be correspondingly changed.

History: En. Sec. 275, Ch. 286, L. 1959.

Cross-Reference

Motor vehicle liability policy, sec. 53-438.

Collateral References

Insurance \hookrightarrow 133.
44 C.J.S. Insurance § 255.

DECISIONS UNDER FORMER LAW

Fire Insurance

A fire insurance policy specifying the parties between whom the contract was made, the rate of premium, the property insured, the risk insured against and the period of time during which the insurance was to continue, contained all the elements of a policy of insurance required by the provisions of former section 40-402. *Baker*

v. Pennsylvania Fire Ins. Co., 81 M 271, 277, 263 P 93.

Under former section 40-402 a contract of fire insurance must be construed as any other contract; the policy must specify the matters enumerated and this information must be supplied to the insurance company by the applicant for the policy. *Stevens v. Steck et al.*, 101 M 569, 576, 55 P 2d 7.

40-3719. Additional policy contents. A policy may contain additional provisions not inconsistent with this code and which are:

- (1) Required to be inserted by the laws of the insurer's domicile;
- (2) Necessary, on account of the manner in which the insurer is constituted or operated, in order to state the rights and obligations of the parties to the contract; or

(3) Desired by the insurer and neither prohibited by law nor in conflict with any provisions required to be included therein.

History: En. Sec. 276, Ch. 286, L. 1959.

40-3720. Charter, bylaw provisions. No policy shall contain any provision purporting to make any portion of the charter, bylaws or other constituent document of the insurer (other than the subscribers' agreement or power of attorney of a reciprocal insurer) a part of the contract unless such portion is set forth in full in the policy. Any policy provision in violation of this section shall be invalid.

History: En. Sec. 277, Ch. 286, L. 1959.

40-3721. Execution of policies. (1) Every insurance policy shall be executed in the name of and on behalf of the insurer by its officer, attorney-in-fact, employee, or representative duly authorized by the insurer.

(2) A facsimile signature of any such executing individual may be used in lieu of an original signature.

(3) No insurance contract heretofore or hereafter issued and which is otherwise valid shall be rendered invalid by reason of the apparent execution thereof on behalf of the insurer by the imprinted facsimile signature of an individual not authorized so to execute as of the date of the policy.

History: En. Sec. 278, Ch. 286, L. 1959.

44 C.J.S. Insurance § 256.

Collateral References

29 Am. Jur. 602, Insurance, §§ 214 et seq.

Insurance—133(2).

40-3722. Underwriters' and combination policies. (1) Two or more authorized insurers may jointly issue, and shall be jointly and severally liable on, an underwriters' policy bearing their names. Any one insurer may issue policies in the name of an underwriter's department and such policy shall plainly show the true name of the insurer.

(2) Two or more insurers may, with the approval of the commissioner, issue a combination policy which shall contain provisions substantially as follows:

(a) That the insurers executing the policy shall be severally liable for the full amount of any loss or damage, according to the terms of the policy, or for specified percentages or amounts thereof, aggregating the full amount of insurance under the policy, and

(b) That service of process, or of any notice or proof of loss required by such policy, upon any of the insurers executing the policy, shall constitute service upon all such insurers.

(3) This section shall not apply to cosurety obligations.

History: En. Sec. 279, Ch. 286, L. 1959.

statements in proof of loss. 58 ALR 2d 429.

Collateral References

Conclusiveness, as against insured, of

40-3723. Interest in reinsurance. The original insured has no interest in a contract of reinsurance.

History: En. Sec. 280, Ch. 286, L. 1959.

Collateral References

Who may enforce liability of reinsurer. 35 ALR 1348.

40-3724. Validity of noncomplying forms. Any insurance policy, rider, or endorsement hereafter issued and otherwise valid which contains any condition or provision not in compliance with the requirements of this code, shall not be thereby rendered invalid but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy, rider, or endorsement been in full compliance with this code.

History: En. Sec. 281, Ch. 286, L. 1959.

40-3725. Construction of policies. Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy and as amplified, extended, or modified by any rider, endorsement, or application which is a part of the policy.

History: En. Sec. 282, Ch. 286, L. 1959.

Collateral References

Insurance 146.

44 C.J.S. Insurance § 298.

29 Am. Jur. 627, Insurance, §§ 245 et seq.

rectly answered by insured, or answers suggested by agent, as affected by limitations or restrictions upon the authority of the agent. 81 ALR 855.

Construction in favor of insured in determining meaning of "infirmity" or "deformity" within accident provision of insurance policy. 75 ALR 2d 1244.

Insertion by insurer's agent in application of false answers to questions cor-

DECISIONS UNDER FORMER LAW

Construction against Insurer

A policy of insurance must be liberally construed in favor of the insured, and strictly construed against the insurer. *Devore v. Mutual Life Ins. Co.*, 103 M 599, 610, 64 P 2d 1071; *Wills v. Midland National Life Insurance Co.*, 108 M 536, 543, 91 P 2d 695.

Delinquent Premium Payment

Contracts of insurance, like other contracts must be construed according to

the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense; the condition in a policy of life insurance that the policy shall cease if the stipulated premium shall not be paid on or before the day fixed is of the very essence and substance of the contract, against which even a court of equity cannot grant relief. *Conlon v. Northern Life Insurance Co.*, 108 M 473, 498, 92 P 2d 284.

40-3726. Binders. (1) Binders or other contracts for temporary insurance may be made orally or in writing, and shall be deemed to include all the usual terms of the policy as to which the binder was given together with such applicable endorsements as are designated in the binder, except as superseded by the clear and express terms of the binder.

(2) No binder shall be valid beyond the issuance of the policy with respect to which it was given, or beyond ninety days from its effective date, whichever period is the shorter.

(3) If the policy has not been issued a binder may be extended or renewed beyond such ninety days with the written approval of the insurer.

(4) This section shall not apply to life or disability insurances.

History: En. Sec. 283, Ch. 286, L. 1959.

Collateral References

Payment or tender of premium to agent as binding principal. 85 ALR 749.

Temporary life, accident, or health insurance pending approval of application or issuance of policy. 2 ALR 2d 943.

40-3727. Delivery of policy. (1) Subject to the insurer's requirements as to payment of premium, every policy shall be mailed or delivered to the insured or to the person entitled thereto within a reasonable period

of time after its issuance, except where a condition required by the insurer has not been met by the insured.

(2) In event the original policy is delivered or is so required to be delivered to or for deposit with any vendor, mortgagee, or pledgee of any motor vehicle or aircraft, and in which policy any interest of the vendee, mortgagor, or pledgor in or with reference to such vehicle or aircraft is insured, a duplicate of such policy setting forth the name and address of the insurer, insurance classification of vehicle or aircraft, type of coverage, limits of liability, premiums for the respective coverages, and duration of the policy or memorandum thereof containing the same such information, shall be delivered by the vendor, mortgagee, or pledgee to each such vendee, mortgagor, or pledgor named in the policy or coming within the group of persons designated in the policy to be so included. If the policy does not provide coverage of legal liability for injury to persons or damage to the property of third parties, a statement of such fact shall be printed, written, or stamped conspicuously on the face of such duplicate policy or memorandum.

History: En. Sec. 284, Ch. 286, L. 1959.

Collateral References

Insurance—136.

44 C.J.S. Insurance §§ 263-266.

29 Am. Jur. 602, Insurance, §§ 214-220.

Liability to mortgagee of insurer which pays loss to mortgagor, in absence of loss-payable clause. 21 ALR 1464.

Breach of a policy by a mortgagor as affecting the mortgagee under a loss-payable clause which does not provide for that event. 38 ALR 367.

Adjustment of a loss by an agreement between a mortgagor and an insurer as affecting the mortgagee under a loss-payable clause. 38 ALR 383.

Purchase of property by mortgagee or holder of mortgaged securities as breach of condition against sale or change of title in insurance policy with mortgage clause. 45 ALR 597.

Liability of mortgagee under mortgage clause for insurance premium. 47 ALR 1126.

Rights as between mortgagor and insurance company where policy avoided as to mortgagor, but not as to mortgagee. 52 ALR 278.

Procuring of insurance by holder of mortgage or deed of trust as violation of provision in mortgagor's policy against additional insurance. 66 ALR 1173.

Comment note: Right of third person to enforce contract between others for his benefit. 81 ALR 1271 and 148 ALR 359.

Repair of premises by owner as affecting right of mortgagee to recover under a mortgage bond or upon a policy taken out by him on his interest. 91 ALR 1354.

Union or standard mortgage clause as relieving mortgagee of mortgagor's breach of conditions at inception of policy or before mortgage clause attached. 97 ALR 1165.

Mortgagee's knowledge or acceptance of mortgagee clause before loss, as condition of his right to benefit of it. 132 ALR 355.

Right of insurer, in absence of subrogation clause, to be subrogated to claim of mortgagee (or conditional vendor) to whom it paid loss, under loss-payable or mortgagee clause, after policy had been canceled as against insured or had become unenforceable by him. 146 ALR 442.

Rights and remedies arising out of delay in passing upon application for insurance. 32 ALR 2d 487.

Effective date of life, health, or accident insurance policy, as between premium date stated in policy, and later date either of approval, acceptance or delivery of policy, or of payment of premium. 44 ALR 2d 472.

40-3728. Renewal by certificate. Any insurance policy terminating by its terms at a specified expiration date and not otherwise renewable, may be renewed or extended at the option of the insurer and upon a currently authorized policy form and at the premium rate then required therefor, for a specific additional period or periods by certificate or by endorsement of the policy, and without requiring the issuance of a new policy.

History: En. Sec. 285, Ch. 286, L. 1959.

Collateral References

Insurance 145.

44 C.J.S. Insurance § 287.

40-3729. Assignment of policies. A policy may be assignable or not assignable, as provided by its terms. Subject to its terms relating to the assignability, any life or disability policy, whether heretofore or hereafter issued, under the terms of which the beneficiary may be changed upon the sole request of the insured may be assigned either by pledge or transfer of title, by an assignment executed by the insured alone and delivered to the insurer, whether or not the pledgee or assignee is the insurer. Any such assignment shall entitle the insurer to deal with the assignee as the owner or pledgee of the policy in accordance with the terms of the assignment, until the insurer has received at its home office written notice of termination of the assignment or pledge, or written notice by or on behalf of some other person claiming some interest in the policy in conflict with the assignment.

History: En. Sec. 286, Ch. 286, L. 1959.

Collateral References

Insurance 199-225.

45 C.J.S. Insurance §§ 410-419.

Effect of insurance provision declaring loss, in case of mortgagee's interest, subject to all the terms and conditions of the policy. 19 ALR 1449.

Change of beneficiary in old line insurance policy as affected by failure to comply with requirements as to consent of insurer. 19 ALR 2d 5.

Power of guardian of incompetent to change beneficiary in ward's life insurance policy. 21 ALR 2d 1191.

Change of beneficiary of life or accident policy by will. 25 ALR 2d 999.

Validity of assignment of life insurance policy to one who has no insurable interest in insured. 30 ALR 2d 1310.

Transfer or pledge of fire insurance policy as collateral security for debt as within policy provisions prohibiting or restricting assignment of policy. 31 ALR 2d 1199.

Effectiveness, as pledge, of transfer of insurance policy. 53 ALR 2d 1404.

Assignment as affecting respective rights of insured and beneficiary in endowment, accumulation, and tontine policies. 72 ALR 2d 1313.

DECISIONS UNDER FORMER LAW

Contract of Sale

When buyer obtains fire insurance for the benefit of the seller, seller's right to the proceeds passes to the assignee al-

though contract of sale is canceled by the seller after fire. *American Equitable Assurance Co. v. Newman*, 132 M 63, 313 P 2d 1023, 1027.

40-3730. Payment discharges insurer. Whenever the proceeds of or payments under a life or disability insurance policy or annuity contract heretofore or hereafter issued become payable in accordance with the terms of such policy or contract, or the exercise of any right or privilege thereunder, and the insurer makes payment thereof in accordance with the terms of the policy or contract or in accordance with any written assignment thereof, the person then designated in the policy or contract or by such assignment as being entitled thereto shall be entitled to receive such proceeds or payments and to give full acquittance therefor, and such payments shall fully discharge the insurer from all claims under the policy or contract unless, before payment is made, the insurer has received at its home office written notice by or on behalf of some other person that such other person claims to be entitled to such payment or some interest in the policy or contract.

History: En. Sec. 287, Ch. 286, L. 1959.

46 C.J.S. Insurance § 1202.

Collateral References

29A Am. Jur. 769, Insurance, §§ 1690 et seq.

Insurance ⇨ 600.

40-3731. Minor may give acquittance. (1) Any minor domiciled in this state who has attained the age of sixteen years shall be deemed competent to receive and to give full acquittance and discharge for a payment or payments in aggregate amount not exceeding three thousand dollars (\$3,000) in any one year made by a life insurer under the maturity, death or settlement agreement provisions in effect or elected by such minor under a life insurance policy or annuity contract, provided such policy, contract or agreement shall provide for the payment or payments to such minor, and if prior to such payment the insurer has not received written notice of the appointment of a duly qualified guardian of the property of the minor. No such minor shall be deemed competent to alienate the right to or to anticipate such payments. This section shall not be deemed to restrict the rights of minors set forth in section 40-3710 of this chapter.

(2) This section shall not be deemed to require any insurer to determine whether any other insurer may be effecting a similar payment to the same minor.

History: En. Sec. 288, Ch. 286, L. 1959.

40-3732. Forms for proof of loss to be furnished. An insurer shall furnish, upon written request of any person claiming to have a loss under an insurance contract issued by such insurer, forms of proof of loss for completion by such person, but such insurer shall not, by reason of the requirement so to furnish forms, have any responsibility for or with reference to the completion of such proof or the manner of any such completion or attempted completion.

History: En. Sec. 289, Ch. 286, L. 1959.

40-3733. Claims administration not waiver. Without limitation of any right or defense of an insurer otherwise, none of the following acts by or on behalf of an insurer shall be deemed to constitute a waiver of any provision of a policy or of any defense of the insurer thereunder:

(1) Acknowledgment of the receipt of notice of loss or claim under the policy.

(2) Furnishing forms for reporting a loss or claim, for giving information relative thereto, or for making proof of loss, or receiving or acknowledging receipt of any such forms or proofs completed or uncompleted.

(3) Investigating any loss or claim under any policy or engaging in negotiations looking toward a possible settlement of any such loss or claim.

History: En. Sec. 290, Ch. 286, L. 1959.

Collateral References

Insurance ⇨ 576(3).

45 C.J.S. Insurance § 982(5). —

29A Am. Jur. 533, Insurance, §§ 1424 et seq.

Denial of liability as waiver of proofs of loss required by insurance policy. 22 ALR 407.

Sufficiency of request, demand, or requirement for sworn statements, notice, certificate, or proofs of loss under fire policy. 78 ALR 1335.

Assignment of claim for loss under fire insurance policy as affecting the furnishing of proofs of loss. 101 ALR 1300.

Mortgagee's duty to make proofs of loss. 130 ALR 602.

Misrepresentations by agent to applicant, insured, or beneficiary, as to proofs

of loss, as basis of action by them other than on policy itself, or as defense to action against them. 136 ALR 31.

Waiver of, or estoppel to assert, provision of policy respecting location of personal property covered thereby. 4 ALR 2d 868.

Act or default of additional insured in respect of giving notice of suit or delivery of suit papers to insurer, as affecting rights of named insured against insurer. 6 ALR 2d 661.

Theory of waiver as applicable where provisions of policy or acts of insurer are inconsistent with statutory requirements. 9 ALR 2d 1436.

Insurer's demand for additional or corrected proof of loss as suspending running

of contractual limitation provision. 15 ALR 2d 955.

Conduct amounting to waiver or estoppel with respect to notice of accident, claim, etc.; or with respect to forwarding suit papers. 18 ALR 2d 490.

Insurer's waiver of, or estoppel to assert, contractual limitation provision. 29 ALR 2d 636.

Waiver of, or estoppel to assert, iron safe clause by attempt to adjust loss. 33 ALR 2d 667.

Insurer's waiver of proof of property loss. 49 ALR 2d 87.

Waiver by or estoppel of insurer as to notice of loss pursuant to clause of motor vehicle theft policy. 66 ALR 2d 1286.

DECISIONS UNDER FORMER LAW

Approval of Proof of Loss

Under former section 40-608, defects in proofs of loss sustained by fire could be waived, and were waived by an adjuster of defendant insurance company by advising plaintiff that the proofs exhibited to him, after certain amendments made, were "all right." *Morrison v. Concordia Fire Ins. Co. et al.*, 72 M 97, 101, 231 P 905.

Failure to Demand Proof of Loss

When notice of a casualty and proof of resulting death are incorporated in the same communication to the insurer, and the proof of the cause of death, with the attendant facts, meets all the requirements of the policy, except that the statement is not as full as it might be, the failure of the insurer to demand more explicit proof is a waiver of his right to thereafter object to its sufficiency. *Da Rin v. Casualty Company of America*, 41 M 175, 187, 108 P 649.

Notwithstanding a clause in a hail insurance policy that defendant company's agents had not the power to orally waive any of its provisions, they could, under former section 40-608, be held to have waived a provision therein for proof of loss by failing to promptly advise the insured, in their negotiations for settlement, that delay in payment of the loss was caused by absence of proof of loss or that the company would rely upon his omission to make the necessary proof. *Ames v. Minneapolis F. & M. Ins. Co.*, 69 M 177, 181, 220 P 747.

Where a fire insurance policy required preliminary proofs of loss, and they were presented in due time but were defective, such defects were waived by the failure of the insurer to make objection to them within a reasonable time; especially so, where such delay operated to delay the time of payment of the loss, or was for such a period as to render it impossible to

remedy the defects within the sixty-day time limit fixed by the policy. *Federal Land Bk. v. Rocky Mt. F. Ins. Co.*, 85 M 405, 416, 279 P 239.

Where a fire insurance company for nine months after a fire made no specific objection on the ground that the insured had failed to file proof of loss, it waived that requirement of the policy, statements in letters sent to the insured that what was said therein was said "without waiving any of the provisions of the policy," not meeting the requirement of specific objection. *Altermatt v. Rocky Mountain Fire Ins. Co.*, 85 M 419, 427, 279 P 243.

The fact that an insurer, even with notice of loss, fails to demand that the insured comply with the stipulation as to proofs of loss does not constitute a waiver thereof, unless coupled with other facts calculated to lead the insured to belief that such proofs need not be made. *Conlon v. Northern Life Insurance Co.*, 108 M 473, 492, 92 P 2d 284.

Investigation of Loss

Failure to furnish proof of a loss by fire as required by the policy was waived where the president of a mutual insurance company, after receiving notice of loss, appointed a committee which went to the scene of the fire and did all it would have done under a formal proof of loss duly filed and did not inform the insured that anything further would be required, the claim being rejected for other reasons. *La Bonte v. Mutual Fire etc. Ins. Co.*, 75 M 1, 12, 241 P 631.

Notice of Loss

In the absence of a more specific provision for notice of loss sustained by fire, the provision of former section 40-605 to the effect that notice thereof given the insurer by some person insured, or entitled to the benefit of the insurance, without

unnecessary delay, was controlling, and where the insurer was notified of loss on the night of the fire by the mortgagee, and the day following one of its agents was advised of the fact by the insured and later one of its adjusters made an investigation, the requirement of the statute above was sufficiently complied with. *Baker v. Pennsylvania Fire Ins. Co.*, 81 M 271, 280, 263 P 93.

The condition of a fidelity insurance bond that notice of loss must be given by the insured within a given period is a condition precedent to recovery on the bond, which, however, was waived under former section 40-608 if the insurer failed to make objection on account of such failure promptly and specifically on that ground. *Montana A. F. Corp. v. Federal Surety Co.*, 85 M 149, 164, 278 P 116.

The provision of former section 40-607 that defects in a notice of loss or in the preliminary proof which the insurer fails to specify as grounds of objection without delay, are waived, was as much a part of the policy of insurance as though written therein, and was controlling when it conflicted with provisions in the policy. *Caldwell v. Washington F. Nat. Ins. Co.*, 94 M 431, 444, 23 P 2d 257.

Pleading of Waiver

Under former section 40-608, where suit on a fire insurance policy was commenced within time, delay in the presentation of notice or proof of loss was waived if caused by the act of the insurer, or if he omitted to make prompt and specific objection on that ground; but to entitle the insured to take advantage of this provision he had to plead the waiver. *Krause v. Insurance Co. of North America*, 73 M 169, 176, 235 P 406.

One who depends upon waiver of proof of loss under an insurance policy, must plead and prove the facts essential to constitute waiver. *Conlon v. Northern Life Insurance Co.*, 108 M 473, 493, 92 P 2d 284.

Where, in an action on a policy containing provisions for sickness and indemnity for loss of time, claimed forfeited because of nonpayment of premium, plaintiff, under this section, claimed that the company waived proof of loss of time by a rider attached to the policy because of its failure promptly to furnish forms on which to make proof, but such failure not being pleaded or proved, there was no foundation upon which the claim of waiver could be based. *Conlon v. Northern Life Insurance Co.*, 108 M 473, 494, 92 P 2d 284.

Preliminary Proof of Loss

Where preliminary proof is required under an insurance policy, the insured is not bound to give such proof as is necessary in a court of justice, the best evidence within his power to give at the time being sufficient to put the insurer upon inquiry to determine whether he is liable. *Caldwell v. Washington F. Nat. Ins. Co.*, 94 M 431, 443, 23 P 2d 257.

Settlement Offer

Where insured had failed to furnish a sworn statement of proof of loss as he was required to do under the provisions of the policy, but the company's adjuster notwithstanding such failure had made offers of settlement, defendant waived the requirement even though the policy provided that such act on the part of its adjuster should not constitute a waiver. *Pasherstnik v. Continental Ins. Co.*, 67 M 19, 27, 214 P 603.

Waiver of Defects in Proof of Loss

Where the insured has attempted to make proof of loss, even though it be insufficient or defective, the burden is cast upon the insurance company to make objection thereto, or it will be deemed to have waived the defect or insufficiency. *Caldwell v. Washington F. Nat. Ins. Co.*, 94 M 431, 443, 23 P 2d 257.

40-3734. Exemption of life insurance proceeds as to creditors. (1) If a policy of insurance, whether heretofore or hereafter issued, is effected by any person on his own life or on another life, in favor of a person other than himself, or except in cases of transfer with intent to defraud creditors, if a policy of life insurance is assigned or in any way made payable to any such person, the lawful beneficiary or assignee thereof, other than the insured or the person so effecting such insurance or executors or administrators of such insured or the person so effecting such insurance, shall be entitled to its proceeds and avails against the creditors and representatives of the insured and of the person effecting the same, whether or not the right to change the beneficiary is reserved or permitted, and whether or not the policy is made payable to the person whose life is insured if the beneficiary or assignee shall predecease such person; except that, subject

to the statute of limitations, the amount of any premiums for such insurance paid with intent to defraud creditors with interest thereon, shall enure to their benefit from the proceeds of the policy; but the insurer issuing the policy shall be discharged of all liability thereof by payment of its proceeds in accordance with its terms, unless before such payment the insurer shall have received written notice at its home office, by or in behalf of a creditor, of a claim to recover for transfer made or premiums paid with intent to defraud creditors, with specifications of the amount so claimed.

(2) For the purposes of subsection (1) above, a policy shall also be deemed to be payable to a person other than the insured if and to the extent that a facility-of-payment clause or similar clause in the policy permits the insurer to discharge its obligation after the death of the individual insured by paying the death benefits to a person as permitted by such clause.

History: En. Sec. 291, Ch. 286, L. 1959. options or other benefits available to him during his lifetime. 37 ALR 2d 268.

Collateral References

Rights of creditors of life insured as to

40-3735. Exemption of proceeds, group life. (1) A policy of group life insurance or the proceeds thereof payable to the individual insured or to the beneficiary thereunder, shall not be liable, either before or after payment, to be applied by any legal or equitable process to pay any debt or liability of such insured individual or his beneficiary or of any other person having a right under the policy. The proceeds thereof, when not made payable to a named beneficiary or to a third person pursuant to a facility-of-payment clause, shall not constitute a part of the estate of the individual insured for the payment of his debts.

(2) This section shall not apply to group life insurance issued pursuant to chapter 39 of this title to a creditor covering his debtors, to the extent that such proceeds are applied to payment of the obligation for the purpose of which the insurance was so issued.

History: En. Sec. 292, Ch. 286, L. 1959.

40-3736. Exemption of proceeds, disability insurance. The proceeds or avails of all contracts of disability insurance and of provisions providing benefits on account of the insured's disability which are supplemental to life insurance or annuity contracts heretofore or hereafter effected shall be exempt from all liability for any debt of the insured, and from any debt of the beneficiary existing at the time the proceeds are made available for his use.

History: En. Sec. 293, Ch. 286, L. 1959. 35 C.J.S. Exemptions §§ 39-42; 46 C.J.S. Insurance § 1179.

Collateral References

Exemptions—50; Insurance—590.

40-3737. Exemption of proceeds, annuity contracts—assignability of rights. (1) The benefits, rights, privileges and options which under any annuity contract heretofore or hereafter issued are due or prospectively due the annuitant, shall not be subject to execution nor shall the annuitant be compelled to exercise any such rights, powers, or options, nor shall creditors be allowed to interfere with or terminate the contract, except:

(a) As to amounts paid for or as premium on any such annuity with intent to defraud creditors, with interest thereon, and of which the creditor has given the insurer written notice at its home office prior to the making of the payments to the annuitant out of which the creditor seeks to recover. Any such notice shall specify the amount claimed or such facts as will enable the insurer to ascertain such amount, and shall set forth such facts as will enable the insurer to ascertain the annuity contract, the annuitant and the payments sought to be avoided on the ground of fraud.

(b) The total exemption of benefits presently due and payable to any annuitant periodically or at stated times under all annuity contracts under which he is an annuitant, shall not at any time exceed two hundred and fifty dollars (\$250) per month for the length of time represented by such installments, and that such periodic payments in excess of three hundred and fifty dollars (\$350) per month shall be subject to garnishee execution.

(c) If the total benefits presently due and payable to any annuitant under all annuity contracts under which he is an annuitant, shall at any time exceed payment at the rate of three hundred and fifty dollars (\$350) per month, then the court may order such annuitant to pay to a judgment creditor or apply on the judgment, in installments, such portion of such excess benefits as to the court may appear just and proper, after due regard for the reasonable requirements of the judgment debtor and his family, if dependent upon him, as well as any payments required to be made by the annuitant to other creditors under prior court orders.

(2) If the contract so provides, the benefits, rights, privileges or options accruing under such contract to a beneficiary or assignee shall not be transferable nor subject to commutation, and if the benefits are payable periodically or at stated times, the same exemptions contained herein for the annuitant, shall apply with respect to such beneficiary or assignee.

(3) An annuity contract within the meaning of this section shall be any obligation to pay certain sums at stated times, during life or lives, or for a specified term or terms, issued for a valuable consideration, regardless of whether or not such sums are payable to one or more persons, jointly or otherwise, but does not include payments under life insurance contracts at stated times during life or lives, or for a specified term or terms.

History: En. Sec. 294, Ch. 286, L. 1959.

CHAPTER 38

LIFE INSURANCE AND ANNUITIES

Section	40-3801.	Scope of chapter.
	40-3802.	"Industrial life insurance" defined.
	40-3803.	Standard provisions required.
	40-3804.	Grace period.
	40-3805.	Incontestability.
	40-3806.	Entire contract
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	40-3808.	Dividends.
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- 40-3812. Reinstatement.
- 40-3813. Payment of premiums.
- 40-3814. Payment of claims.
- 40-3815. Beneficiary, industrial policies.
- 40-3816. Title.
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- 40-3818. Standard provisions—annuity and pure endowment contracts.
- 40-3819. Grace period—annuities.
- 40-3820. Incontestability—annuities.
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- 40-3824. Reinstatement—annuities.
- 40-3825. Standard provisions—reversionary annuities.
- 40-3826. Limitation of liability.
- 40-3827. Prohibited provisions, industrial life insurance.
- 40-3828. Incontestability, limitation of liability after reinstatement.
- 40-3829. Policy settlements.
- 40-3830. Indebtedness deducted from proceeds.
- 40-3831. Standard nonforfeiture law—life insurance.
- 40-3832. Nonforfeiture rights, old policies.
- 40-3833. Prohibited policy plans.

40-3801. Scope of chapter. This chapter applies only to contracts of life insurance and annuities, other than reinsurance, group life insurance and group annuities.

History: En. Sec. 295, Ch. 286, L. 1959.

40-3802. "Industrial life insurance" defined. For the purposes of this code "industrial life insurance" is that form of life insurance written under policies of face amount of one thousand dollars (\$1,000) or less bearing the words "industrial policy" imprinted on the face thereof as part of the descriptive matter, and under which premiums are payable monthly or more often.

History: En. Sec. 296, Ch. 286, L. 1959.

40-3803. Standard provisions required. (1) No policy of life insurance other than group, and pure endowments with or without return of premiums or of premiums and interest, shall be delivered or issued for delivery in this state unless it contains in substance all of the applicable provisions as required by sections 40-3804 to 40-3816, inclusive, of this chapter. This section shall not apply to annuity contracts nor to any provision of a life insurance policy, or contract supplemental thereto, relating to disability benefits or to additional benefits in the event of death by accident or accidental means.

(2) Any of such provisions or portions thereof not applicable to single premium or term policies shall to that extent not be incorporated therein.

History: En. Sec. 297, Ch. 286, L. 1959. 44 C.J.S. Insurance § 251.

Collateral References

Insurance—133.

29A Am. Jur. 291, Insurance, §§ 1136 et seq.

40-3804. Grace period. There shall be a provision that a grace period of thirty (30) days, or, at the option of the insurer, of one month of not less than thirty (30) days, or of four (4) weeks in the case of industrial life insurance policies the premiums for which are payable more frequently than monthly, shall be allowed within which the payment of any

premium after the first may be made, during which period of grace the policy shall continue in full force; but if a claim arises under the policy during such period of grace the amount of any premium due or overdue may be deducted from the policy proceeds.

History: En. Sec. 298, Ch. 286, L. 1959.

where last day falls on Sunday or holiday.
53 ALR 2d 877.

Collateral References

Time for payment of insurance premium

DECISIONS UNDER FORMER LAW

Time of Essence of Contract

The condition in a policy of life insurance that the policy shall cease if the stipulated premium shall not be paid on or before the day fixed was of the very es-

sence and substance of the contract, against which even a court of equity could not grant relief. *Conlon v. Northern Life Insurance Co.*, 108 M 473, 498, 92 P 2d 284.

40-3805. Incontestability. There shall be a provision that the policy (exclusive of provisions relating to disability benefits or to additional benefits in the event of death by accident or accidental means) shall be incontestable, except for nonpayment of premiums, after it has been in force during the lifetime of the insured for a period of two (2) years from its date of issue.

History: En. Sec. 299, Ch. 286, L. 1959.

vision of life or accident policy relating to aeronautics. 17 ALR 2d 1050.

Collateral References

Incontestable clause as applicable to suit to reform insurance policy. 7 ALR 2d 504.

Incontestability clause as affecting pro-

Insurer from defending on ground of particular clause and life policy limiting or precluding insurer's liability because of other life insurance. 22 ALR 2d 809.

DECISIONS UNDER FORMER LAW

Sound Health

The term "sound health" as used in life insurance policy under which insurer may declare the policy void if insured is not so at date of the issuance of the policy, means freedom from any physical affliction of a serious nature undermining his

constitution; does not apply to temporary afflictions; when stipulated in policy is a warranty in nature of condition precedent requiring strict compliance to justify recovery. *Schroeder v. Metropolitan Life Insurance Co.*, 103 M 547, 557, 63 P 2d 1016.

40-3806. Entire contract. There shall be a provision that the policy, or the policy and the application therefor if a copy of such application is endorsed upon or attached to the policy when issued, shall constitute the entire contract between the parties, and if the application is so made a part of the policy, that all statements contained in the application shall, in the absence of fraud, be deemed representations and not warranties.

History: En. Sec. 300, Ch. 286, L. 1959.

DECISIONS UNDER FORMER LAW

Warranty

A "warranty" in a life insurance policy must be part and parcel of the contract—made so by express agreement of the parties upon the face thereof; and where a warranty is found to have been violated it

is unnecessary to determine the legal effect of an alleged fraudulent representation appearing in the application for the policy. *Schroeder v. Metropolitan Life Insurance Co.*, 103 M 547, 557, 63 P 2d 1016.

40-3807. Misstatement of age. There shall be a provision that if the age of the insured or of any other person whose age is considered in determining the premium has been misstated, any amount payable or benefit accruing under the policy shall be such as the premium would have purchased at the correct age or ages.

History: En. Sec. 301, Ch. 286, L. 1959.

40-3808. Dividends. (1) There shall be a provision in participating policies that, beginning not later than the end of the third policy year, the insurer shall annually ascertain and apportion the divisible surplus, if any, that will accrue on the policy anniversary or other dividend date specified in the policy provided the policy is in force and all premiums to that date are paid. Except as hereinafter provided, any dividend becoming payable shall at the option of the party entitled to elect such option be either:

(a) Payable in cash, or

(b) Applied to any one of such other dividend options as may be provided by the policy. If any such other dividend options are provided, the policy shall further state which option shall be automatically effective if such party shall not have elected some other option. If the policy specifies a period within which such other dividend option may be elected, such period shall be not less than thirty (30) days following the date on which such dividend is due and payable. The annually apportioned dividend shall be deemed to be payable in cash within the meaning of (a) above even though the policy provides that payment of such dividend is to be deferred for a specified period, provided such period does not exceed six (6) years from the date of apportionment and that interest will be added to such dividend at a specified rate. If a participating policy provides that the benefit under any paid-up nonforfeiture provision is to be participating, it may provide that any divisible surplus becoming payable or apportioned while the insurance is in force under such nonforfeiture provision shall be applied in the manner set forth in the policy.

(2) In participating industrial life insurance policies, in lieu of the provision required in subsection (1) above, there shall be a provision that, beginning not later than the end of the fifth policy year, the policy shall participate annually in the divisible surplus, if any, in the manner set forth in the policy.

History: En. Sec. 302, Ch. 286, L. 1959.

40-3809. Policy loan. There shall be a provision that after three (3) full years' premiums have been paid and after the policy has a cash surrender value and while no premium is in default beyond the grace period for payment, the insurer will advance, on proper assignment or pledge of the policy and on the sole security thereof, at a specified rate of interest not exceeding six per cent (6%) per annum, an amount equal to or, at the option of the party entitled thereto, less than the loan value of the policy. The loan value of the policy shall be at least equal to the cash surrender value at the end of the then current policy year, provided that the insurer may deduct, either from such loan value or from the proceeds of the loan,

any existing indebtedness not already deducted in determining such cash surrender value including any interest then accrued but not due, any unpaid balance of the premium for the current policy year, and interest on the loan to the end of the current policy year. The policy may also provide that if interest on any indebtedness is not paid when due it shall then be added to the existing indebtedness and shall bear interest at the same rate, and that if and when the total indebtedness on the policy, including interest due or accrued, equals or exceeds the amount of the loan value thereof, then the policy shall terminate and become void. The policy shall reserve to the insurer the right to defer the granting of a loan, other than for the payment of any premium to the insurer, for six (6) months after application therefor. The policy, at the insurer's option, may provide for automatic premium loan, subject to an election of the party entitled to elect.

This section shall not apply to term policies nor to term insurance benefits provided by rider or supplemental policy provisions, or to industrial life insurance policies.

History: En. Sec. 303, Ch. 286, L. 1959. of insured who borrowed on the policy. 31 ALR 2d 979.

Collateral References

Right of beneficiary as against estate

40-3810. Table of values. There shall be a table showing in figures the loan value, if required under section 40-3809, and the cash surrender values and nonforfeiture benefits in accordance with section 40-3831 (2) (e), either during the first twenty (20) policy years or during the term of the policy, whichever is shorter.

History: En. Sec. 304, Ch. 286, L. 1959.

40-3811. Table of installments. In case the policy provides that the proceeds may be payable in installments which are determinable at issue of the policy, there shall be a table showing the amounts of the guaranteed installments.

History: En. Sec. 305, Ch. 286, L. 1959.

40-3812. Reinstatement. There shall be a provision that unless:

- (1) The policy has been surrendered for its cash surrender value, or
- (2) Its cash surrender value has been exhausted, or
- (3) The paid-up term insurance, if any, has expired, the policy will be reinstated at any time within three (3) years (or two (2) years in the case of industrial life insurance policies) from the date of premium default upon written application therefor, the production of evidence of insurability satisfactory to the insurer, the payment of all premiums in arrears and the payment or reinstatement of any other indebtedness to the insurer upon the policy, all with interest at a rate not exceeding six per cent (6%) per annum compounded annually.

History: En. Sec. 306, Ch. 286, L. 1959.

40-3813. Payment of premiums. There shall be a provision relative to the payment of premiums.

History: En. Sec. 307, Ch. 286, L. 1959.

40-3814. Payment of claims. There shall be a provision that when a policy shall become a claim by the death of the insured, settlement shall be made upon receipt of due proof of death and, at the insurer's option, surrender of the policy and/or proof of the interest of the claimant. If an insurer shall specify a particular period prior to the expiration of which settlement shall be made, such period shall not exceed two (2) months from the receipt of such proofs.

History: En. Sec. 308, Ch. 286, L. 1959. case of insured's disappearance. 26 ALR 2d 1073.

Collateral References

Form and sufficiency of proof of death in

DECISIONS UNDER FORMER LAW

Death Certificate Binding Beneficiary

Where attending physician recited in death certificate that he treated insured some six weeks before date of policy and cause of death was heart disease and acute bronchitis, and beneficiary adopted the certificate in making proof of death,

the certificate makes out a prima facie case of the truth of the statements, and is sufficient evidence to establish breach of warranty. *Schroeder v. Metropolitan Life Insurance Co.*, 103 M 547, 561, 63 P 2d 1016.

40-3815. Beneficiary, industrial policies. An industrial life insurance policy shall have the name of the beneficiary designated thereon with a reservation of the right to designate or change the beneficiary after the issuance of the policy. The policy may also provide that no designation or change of beneficiary shall be binding on the insurer until endorsed on the policy by the insurer, and that the insurer may refuse to endorse the name of any proposed beneficiary who does not appear to the insurer to have an insurable interest in the life of the insured. The policy may also provide that if the beneficiary designated in the policy does not make a claim under the policy or does not surrender the policy with due proof of death within the period stated in the policy, which shall not be less than thirty (30) days after the death of the insured, or if the beneficiary is the estate of the insured, or is a minor, or dies before the insured, or is not legally competent to give a valid release, then the insurer may make any payment thereunder to the executor or administrator of the insured, or to any relative of the insured by blood or legal adoption or connection by marriage, or to any person appearing to the insurer to be equitably entitled thereto by reason of having been named beneficiary, or by reason of having incurred expense for the maintenance, medical attention or burial of the insured. The policy may also include a similar provision applicable to any other payment due under the policy.

History: En. Sec. 309, Ch. 286, L. 1959.

40-3816. Title. There shall be a title on the policy, briefly describing the same.

History: En. Sec. 310, Ch. 286, L. 1959.

40-3817. Excluded or restricted coverage. A clause in any policy of life insurance providing that such policy shall be incontestable after a specified period shall preclude only a contest of the validity of the policy, and shall not preclude the assertion at any time of defenses based upon

provisions in the policy which exclude or restrict coverage, whether or not such restrictions or exclusions are excepted in such clause.

History: En. Sec. 311, Ch. 286, L. 1959.

40-3818. Standard provisions—annuity and pure endowment contracts.

(1) No annuity or pure endowment contract, other than reversionary annuities, survivorship annuities or group annuities and except as stated herein, shall be delivered or issued for delivery in this state unless it contains in substance each of the provisions specified in sections 40-3819 to 40-3824, inclusive, of this chapter. Any of such provisions not applicable to single premium annuities or single premium pure endowment contracts shall not, to that extent, be incorporated therein.

(2) This section shall not apply to contracts for deferred annuities included in or upon the lives of beneficiaries under, life insurance policies.

History: En. Sec. 312, Ch. 286, L. 1959.

40-3819. Grace period—annuities. In an annuity or pure endowment contract, other than a reversionary, survivorship or group annuity, there shall be a provision that there shall be a period of grace of one month, but not less than thirty (30) days, within which any stipulated payment to the insurer falling due after the first may be made, subject at the option of the insurer to an interest charge thereon at a rate to be specified in the contract but not exceeding six per cent (6%) per annum for the number of days of grace elapsing before such payment, during which period of grace the contract shall continue in full force; but in case a claim arises under the contract on account of death prior to expiration of the period of grace before the overdue payment to the insurer or the deferred payments of the current contract year, if any, are made, the amount of such payments, with interest on any overdue payments, may be deducted from any amount payable under the contract in settlement.

History: En. Sec. 313, Ch. 286, L. 1959. where last day falls on Sunday or holiday.
53 ALR 2d 877.

Collateral References

Time for payment of insurance premium

40-3820. Incontestability—annuities. If any statements, other than those relating to age, sex and identity are required as a condition to issuing an annuity or pure endowment contract, other than a reversionary, survivorship, or group annuity, and subject to section 40-3822 of this chapter, there shall be a provision that the contract shall be incontestable after it has been in force during the lifetime of the person or of each of the persons as to whom such statements are required, for a period of two (2) years from its date of issue, except for nonpayment of stipulated payments to the insurer; and at the option of the insurer such contract may also except any provisions relative to benefits in the event of disability and any provisions which grant insurance specifically against death by accident or accidental means.

History: En. Sec. 314, Ch. 286, L. 1959. **Collateral References**

Incontestable clause as applicable to suit
to reform insurance policy. 7 ALR 2d 504.

40-3821. Entire contract—annuities. In an annuity or pure endowment contract, other than a reversionary, survivorship, or group annuity, there shall be a provision that the contract shall constitute the entire contract between the parties or, if a copy of the application is endorsed upon or attached to the contract when issued, a provision that the contract and the application therefor shall constitute the entire contract between the parties.

History: En. Sec. 315, Ch. 286, L. 1959.

40-3822. Misstatement of age or sex—annuities. In an annuity or pure endowment contract, other than a reversionary, survivorship, or group annuity, there shall be a provision that if the age or sex of the person or persons upon whose life or lives the contract is made, or of any of them, has been misstated, the amount payable or benefits accruing under the contract shall be such as the stipulated payment or payments to the insurer would have purchased according to the correct age or sex and that if the insurer shall make or has made any overpayment or overpayments on account of any such misstatement, the amount thereof, with interest at the rate to be specified in the contract but not exceeding six per cent (6%) per annum, may be charged against the current or next succeeding payment or payments to be made by the insurer under the contract.

History: En. Sec. 316, Ch. 286, L. 1959.

40-3823. Dividends—annuities. If an annuity or pure endowment contract, other than a reversionary survivorship, or group annuity, is participating, there shall be a provision that the insurer shall annually ascertain and apportion any divisible surplus accruing on the contract.

History: En. Sec. 317, Ch. 286, L. 1959. subject to rights of creditors of insured.
37 ALR 2d 314.

Collateral References

Dividends of life insurance policy as

40-3824. Reinstatement—annuities. In an annuity or pure endowment contract, other than a reversionary, survivorship, or group annuity, there shall be a provision that the contract may be reinstated at any time within one year from the default in making stipulated payments to the insurer, unless the cash surrender value had been paid, but all overdue stipulated payments and any indebtedness to the insurer on the contract shall be paid or reinstated with interest thereon at a rate to be specified in the contract but not exceeding six per cent (6%) per annum payable annually, and in cases where applicable the insurer may also include a requirement of evidence of insurability satisfactory to the insurer.

History: En. Sec. 318, Ch. 286, L. 1959.

40-3825. Standard provisions—reversionary annuities. (1) Except as stated herein, no contract for a reversionary annuity shall be delivered or issued for delivery in this state unless it contains in substance each of the following provisions:

(a) Any such reversionary annuity contract shall contain the provisions specified in sections 40-3819 through 40-3823 except that under section 40-3819 the insurer may at its option provide for an equitable re-

duction of the amount of the annuity payments in settlement of an overdue payment in lieu of providing for deduction of such payments from an amount payable upon settlement under the contract.

(b) In such reversionary annuity contracts there shall be a provision that the contract may be reinstated at any time within three (3) years from the date of default in making stipulated payments to the insurer, upon production of evidence of insurability satisfactory to the insurer, and upon condition that all overdue payments and any indebtedness to the insurer on account of the contract be paid, or, within the limits permitted by the then cash values of the contract, reinstated, with interest as to both payments and indebtedness at a rate to be specified in the contract but not exceeding six per cent (6%) per annum compounded annually.

(2) This section shall not apply to group annuities or to annuities included in life insurance policies, and any of such provisions not applicable to single premium annuities shall not to that extent be incorporated therein.

History: En. Sec. 319, Ch. 286, L. 1959.

40-3826. Limitation of liability. (1) No policy of life insurance shall be delivered or issued for delivery in this state if it contains any of the following provisions:

(a) A provision for a period shorter than that provided by statute within which an action at law or in equity may be commenced on such a policy.

(b) A provision which excludes or restricts liability for death caused in a certain specified manner or occurring while the insured has a specified status, except that a policy may contain provisions excluding or restricting coverage as specified therein in the event of death under any one or more of the following circumstances:

(i) Death as a result, directly or indirectly, of war, declared or undeclared, or of action by military forces, or of any act or hazard of such war or action, or of service in the military, naval, or air forces or in civilian forces auxiliary thereto, or from any cause while a member of such military, naval, or air forces of any country at war, declared or undeclared, or of any country engaged in such military action;

(ii) Death as a result of aviation or any air travel or flight;

(iii) Death as a result of a specified hazardous occupation or occupations;

(iv) Death while the insured is a resident outside continental United States and Canada; or

(v) Death within two (2) years from the date of issue of the policy as a result of suicide, while sane or insane.

(2) A policy which contains any exclusion or restriction pursuant to subsection (1) of this section shall also provide that in the event of death under the circumstances to which any such exclusion or restriction is applicable, the insurer will pay an amount not less than a reserve determined according to the commissioner's reserve valuation method upon the basis of the mortality table and interest rate specified in the policy for the

calculation of nonforfeiture benefits (or if the policy provides for no such benefits, computed according to a mortality table and interest rate determined by the insurer and specified in the policy) with adjustment for indebtedness or dividend credit.

(3) This section shall not apply to industrial life insurance, group life insurance, disability insurance, reinsurance, or annuities, or to any provision in a life insurance policy relating to disability benefits or to additional benefits in the event of death by accident or accidental means.

(4) Nothing contained in this section shall prohibit any provision which in the opinion of the commissioner is more favorable to the policyholder than a provision permitted by this section.

History: En. Sec. 320, Ch. 286, L. 1959.

Collateral References

Insurance 438-448.

45 C.J.S. Insurance §§ 667-671.

29A Am. Jur. 291, Insurance, § 1137.

Applicability to limitation prescribed by policy of insurance, or by special statutory provision in relation to insurance, of provisions of statute of limitations extending time or fixing time when action deemed commenced. 149 ALR 483.

Construction and application of provision of life or accident policy relating to aeronautics. 17 ALR 2d 1041.

Intention of parties as affecting interpretation of provisions in life or accident policy in relation to military service. 36 ALR 2d 1032.

What constitutes "participation" in aeronautics within provision of life policy relating to aeronautics. 45 ALR 2d 462.

What constitutes operating, riding in, or descending from aircraft within provision of life policy relating to aeronautics. 47 ALR 2d 1021.

What is "aircraft" or the like within meaning of aviation exception clause of life insurance policy. 54 ALR 2d 413.

40-3827. Prohibited provisions, industrial life insurance. No policy of industrial life insurance shall contain any of the following provisions:

(1) A provision by which the insurer may deny liability under the policy for the reason that the insured has previously obtained other insurance from the same insurer.

(2) A provision giving the insurer the right to declare the policy void because the insured has had any disease or ailment, whether specified or not, or because the insured has received institutional, hospital, medical or surgical treatment or attention, except a provision which gives the insurer the right to declare the policy void if the insured has, within two years prior to the issuance of the policy, received institutional, hospital, medical or surgical treatment or attention and if the insured or claimant under the policy fails to show that the condition occasioning such treatment or attention was not of a serious nature or was not material to the risk.

(3) A provision giving the insurer the right to declare the policy void because the insured has been rejected for insurance, unless such right be conditioned upon a showing by the insurer that knowledge of such rejection would have led to a refusal by the insurer to make such contract.

History: En. Sec. 321, Ch. 286, L. 1959.

40-3828. Incontestability, limitation of liability after reinstatement.

(1) A reinstated policy of life insurance or annuity contract may be contested on account of fraud or misrepresentation of facts material to the reinstatement only for the same period following reinstatement and with the same conditions and exceptions as the policy provides with respect to contestability after original issuance.

(2) When any life insurance policy or annuity contract is reinstated, such reinstated policy or contract may exclude or restrict liability to the same extent that such liability might have been or was excluded or restricted when the policy or contract was originally issued, and such exclusion or restriction shall be effective from the date of reinstatement.

History: En. Sec. 322, Ch. 286, L. 1959.

40-3829. Policy settlements. Any life insurer shall have the power to hold under agreement the proceeds of any policy issued by it, upon such terms and restrictions as to revocation by the policyholder and control by beneficiaries, and with such exemptions from the claims of creditors of beneficiaries other than the policyholder as set forth in the policy or as agreed to in writing by the insurer and the policyholder. Upon maturity of a policy, in the event the policyholder has made no such agreement, the insurer shall have the power to hold the proceeds of the policy under an agreement with the beneficiaries. The insurer shall not be required to segregate the funds so held but may hold them as part of its general assets.

History: En. Sec. 323, Ch. 286, L. 1959.

40-3830. Indebtedness deducted from proceeds. In determining the amount due under any life insurance policy heretofore or hereafter issued, deduction may be made of:

(1) Any unpaid premiums or installments thereof for the current policy year due under the terms of the policy, and of

(2) The amount of principal and accrued interest of any policy loan or other indebtedness against the policy then remaining unpaid.

History: En. Sec. 324, Ch. 286, L. 1959. of additional annual or periodic premium where insured dies on premium due day.
45 ALR 2d 1264.

Collateral References

Deduction from life insurance proceeds

40-3831. Standard nonforfeiture law—life insurance. (1) This section shall be known as the standard nonforfeiture law.

(2) Nonforfeiture provisions—Life: In the case of policies issued on or after the operative date of this section as defined in subsection (11) of this section, no policy of life insurance, except as set forth in subsection (10) of this section, shall be delivered or issued for delivery in this state unless it shall contain in substance the following provisions, or corresponding provisions which in the opinion of the commissioner are at least as favorable to the defaulting or surrendering policyholder:

(a) That in the event of default in any premium payment, after premiums have been paid for at least one full year, the insurer will grant, upon proper request not later than sixty (60) days after the due date of the premium in default, a paid-up nonforfeiture benefit on a plan stipulated in the policy, effective as of such due date of such value as may be hereinafter specified.

(b) That upon surrender of the policy within sixty (60) days after the due date of any premium payment in default after premiums have been paid for at least three (3) full years in the case of ordinary insurance, and five (5) full years in the case of industrial insurance, the insurer will pay,

in lieu of any paid-up nonforfeiture benefit, a cash surrender value of such amount as may be hereinafter specified.

(c) That a specified paid-up nonforfeiture benefit shall become effective as specified in the policy unless the person entitled to make such election elects another available option not later than sixty (60) days after the due date of the premium in default.

(d) That if the policy shall have become paid up by completion of all premium payments, or if it is continued under any paid-up nonforfeiture benefit which became effective on or after the third policy anniversary in the case of ordinary insurance, or the fifth policy anniversary in the case of industrial insurance, the insurer will pay, upon surrender of the policy within thirty (30) days after any policy anniversary, a cash surrender value of such amount as may be hereinafter specified.

(e) A statement of the mortality table and interest rate used in calculating the cash surrender values and the paid-up nonforfeiture benefits available under the policy, together with a table showing the cash surrender value, if any, and paid-up nonforfeiture benefit, if any, available under the policy on each policy anniversary, either during the first twenty (20) policy years or during the term of the policy, whichever is shorter, such values and benefits to be calculated upon the assumption that there are no dividends or paid-up additions credited to the policy and that there is no indebtedness to the insurer on the policy.

(f) A statement that the cash surrender values and the paid-up nonforfeiture benefits available under the policy are not less than the minimum values and benefits required by or pursuant to the insurance law of this state; an explanation of the manner in which the cash surrender values and the paid-up nonforfeiture benefits are altered by the existence of any paid-up additions credited to the policy or any indebtedness to the insurer on the policy; if a detailed statement of the method of computation of the values and benefits shown in the policy is not stated therein, a statement that such method of computation has been filed with the insurance supervisory official of the state in which the policy is delivered; and a statement of the method to be used in calculating the cash surrender value and paid-up nonforfeiture benefit available under the policy on any policy anniversary beyond the last anniversary for which such values and benefits are consecutively shown in the policy.

(3) Any of the provisions or portions thereof set forth in subdivisions (a) through (f) of the foregoing subsection (2) which are not applicable by reason of the plan of insurance may, to the extent inapplicable, be omitted from the policy. The insurer shall reserve the right to defer the payment of any cash surrender value for a period of six (6) months after demand therefor with surrender of the policy.

(4) Cash surrender value—life: Any cash surrender value available under the policy in the event of default in the premium payment due on any policy anniversary, whether or not required by subsection (2) of this section, shall be an amount not less than the excess, if any, of the present value on such anniversary of the future guaranteed benefits which would have been provided for by the policy, including any existing paid-up additions if there had been no default, over the sum of:

(a) The then present value of the adjusted premiums as defined in subsections (6), (7), (7-a), (8) and (8-a) of this section, corresponding to premiums which would have fallen due on and after such anniversary, and

(b) The amount of any indebtedness to the insurer on account of or secured by the policy. Any cash surrender value available within thirty (30) days after any policy anniversary under any policy paid up by completion of all premium payments, or any policy continued under any paid-up nonforfeiture benefits, whether or not required by such subsection (2), shall be an amount not less than the present value, on such anniversary, of the future guaranteed benefits provided for by the policy, including any existing paid-up additions, decreased by any indebtedness to the insurer on account of or secured by the policy.

(5) Paid-up nonforfeiture benefit—Life: Any paid-up nonforfeiture benefit available under the policy in the event of default in the premium payment due on any policy anniversary shall be such that its present value as of such anniversary shall be at least equal to the cash surrender value then provided for by the policy, or, if none is provided for, that cash surrender value which would have been required by this section in the absence of the conditions that premiums shall have been paid for at least a specified period.

(6) The adjusted premium—life: Except as provided in subsection (7-a), the adjusted premiums for any policy shall be calculated on an annual basis and shall be such uniform percentage of the respective premiums specified in the policy for each policy year, excluding extra premiums on a substandard policy, that the present value, at the date of issue of the policy, of all such adjusted premiums shall be equal to the sum of:

(a) The then present value of the future guaranteed benefits provided for by the policy;

(b) Two per cent (2%) of the amount of the insurance if the insurance be uniform in amount, or of the equivalent uniform amount, as hereinafter defined, if the amount of insurance varies with the duration of the policy;

(c) Forty per cent (40%) of the adjusted premium for the first policy year;

(d) Twenty-five per cent (25%) of either the adjusted premium for the first policy year or the adjusted premium for a whole life policy of the same uniform or equivalent uniform amount with uniform premiums for the whole of life issued at the same age for the same amount of insurance, whichever is less, provided, however, that in applying the percentages specified in subdivisions (c) and (d) above, no adjusted premiums shall be deemed to exceed four per cent of the amount of insurance or uniform amount equivalent thereto. Whenever the plan or term of a policy has been changed, either by request of the insured or automatically in accordance with the provisions of the policy, the date of inception of the changed policy for the purposes of determining a nonforfeiture benefit or cash surrender value shall be the date as of which the age of the insured

is determined for the purposes of the changed policy. The date of issue of a policy for the purposes of this subsection shall be the date as of which the rated age of the insured is determined.

(7) In the case of a policy providing an amount of insurance varying with the duration of the policy, the equivalent uniform amount thereof for the purpose of the preceding subsection (6) shall be deemed to be the uniform amount of insurance provided by an otherwise similar policy, containing the same endowment benefit or benefits, if any, issued at the same age and for the same term, the amount of which does not vary with duration and the benefits under which have the same present value at the date of issue as the benefits under the policy, provided, however, that in the case of a policy for a varying amount of insurance issued on the life of a child under age ten (10), the equivalent uniform amount may be computed as though the amount of insurance provided by the policy prior to the attainment of age ten were the amount provided by such policy at age ten (10).

(7-a) The adjusted premiums for any policy providing term insurance benefits by rider or supplemental policy provision shall be equal to (i) the adjusted premiums for an otherwise similar policy issued at the same age without such term insurance benefits, increased, during the period for which premiums for such term insurance benefits are payable, by (ii) the adjusted premiums for such term insurance, the foregoing items (i) and (ii) being calculated separately and as specified in subsections (6) and (7) except that, for the purposes of (b), (c), and (d) of subsection (6), the amount of insurance or equivalent uniform amount of insurance used in the calculation of the adjusted premiums referred to in (ii) shall be equal to the excess of the corresponding amount determined for the entire policy over the amount used in the calculation of the adjusted premiums in (i).

(8) Except as otherwise provided in subsection (8-a), all adjusted premiums and present values referred to in this section shall for all policies of ordinary insurance be calculated on the basis of the commissioner's 1941 standard ordinary mortality table, provided that for any category of ordinary insurance issued on female risks, adjusted premiums and present values may be calculated, at the option of the insurer with approval of the commissioner, according to an age younger than the actual age of the insured. Such calculations for all policies of industrial insurance shall be made on the basis of the 1941 standard industrial mortality table. All calculations shall be made on the basis of the rate of interest, not exceeding three and one-half per cent ($3\frac{1}{2}\%$) per annum, specified in the policy for calculating cash surrender values and paid-up nonforfeiture benefits, provided, however, that in calculating the present value of any paid-up term insurance with accompanying pure endowment, if any, offered as a nonforfeiture benefit, the rates of mortality assumed may be not more than one hundred thirty per cent (130%) of the rates of mortality according to such applicable table, provided further that for insurance issued on a substandard basis, the calculation of any such adjusted premiums and present values may be based on such other table of mortality as may be specified by the insurer and approved by the commissioner.

(8-a) In the case of ordinary policies issued on or after the operative date of this subsection (8-a) as defined herein, all adjusted premiums and present values referred to in this section shall be calculated on the basis of the commissioners 1958 standard ordinary mortality table and the rate of interest, not exceeding three and one-half per cent ($3\frac{1}{2}\%$) per annum, specified in the policy for calculating cash surrender values and paid-up nonforfeiture benefits, provided that for any category of ordinary insurance issued on female risks, adjusted premiums and present values may be calculated according to an age not more than three years younger than the actual age of the insured. Provided, however, that in calculating the present value of any paid-up term insurance with accompanying pure endowment, if any, offered as a nonforfeiture benefit, the rates of mortality assumed may be not more than those shown in the commissioners 1958 extended term insurance table. Provided, further, that for insurance issued on a substandard basis, the calculation of any such adjusted premiums and present values may be based on such other table of mortality as may be specified by the company and approved by the commissioner.

After the effective date of this subsection (8-a), any insurer may file with the commissioner a written notice of its election to comply with the provisions of this subsection after a specified date before January first, nineteen hundred and sixty-six. After the filing of such notice, then upon such specified date (which shall be the operative date of this subsection for such insurer), this subsection shall become operative with respect to the ordinary policies thereafter issued by such insurer. If an insurer makes no such election, the operative date of this subsection for such insurer shall be January first, nineteen hundred and sixty-six.

(9) Calculation of values—life: Any cash surrender value and any paid-up nonforfeiture benefit available under the policy in the event of default in a premium payment due at any time other than on the policy anniversary shall be calculated with allowance for the lapse of time and the payment of fractional premiums beyond the last preceding policy anniversary. All values referred to in subsections (4), (5), (6), (7), (7-a), (8) and (8-a) of this section may be calculated upon the assumption that any death benefit is payable at the end of the policy year of death. The net value of any paid-up additions, other than paid-up term additions, shall be not less than the dividends used to provide such additions. Notwithstanding the provisions of subsection (4) of this section, additional benefits payable:

(a) In the event of death or dismemberment by accident or accidental means,

(b) In the event of total and permanent disability,

(c) As reversionary annuity or deferred reversionary annuity benefits,

(d) As term insurance benefits provided by a rider or supplemental policy provision to which, if issued as a separate policy, this section would not apply,

(e) As term insurance on the life of a child or on the lives of children provided in a policy on the life of a parent of the child, if such term insurance expires before the child's age is twenty-six, is uniform in amount

after the child's age is one, and has not become paid up by reason of the death of a parent of the child, and

(f) As other policy benefits additional to life insurance and endowment benefits, and premiums for all such additional benefits,

Shall be disregarded in ascertaining cash surrender values and nonforfeiture benefits required by this section, and no such additional benefits shall be required to be included in any paid-up nonforfeiture benefits.

(10) Exceptions. This section shall not apply to any reinsurance, group insurance, pure endowment, annuity or reversionary annuity contract, nor to any term policy of uniform amount, or renewal thereof, of fifteen (15) years or less expiring before age 66 for which uniform premiums are payable during the entire term of the policy, nor to any term policy of decreasing amount on which each adjusted premium, calculated as specified in subsections (6), (7), (7-a), (8) and (8-a) of this section is less than the adjusted premiums so calculated on a policy issued at the same age and for the same initial amount of insurance for a term defined as follows: For ages at issue fifty (50) and under, the term shall be fifteen (15) years; thereafter, the term shall decrease one (1) year for each year of age beyond fifty (50).

(11) Operative date. After the effective date of the act by which this section was originally enacted, any insurer could have filed with the state auditor a written notice of its election to comply with the provisions of this section after a specified date before January 1, 1948, with respect to the policies specified in the notice. After the filing of such notice, then upon such specified date (which shall be the operative date for such insurer with respect to such policies), this section shall have become operative with respect to the policies specified in such notice thereafter issued by such insurer. As to all of its policies and contracts with respect to which an insurer makes no such election, the operative date of this section with respect to such policies and contracts for such insurer is January 1, 1948.

History: En. Sec. 325, Ch. 286, L. 1959;
amd. Sec. 1, Ch. 65, L. 1961.

Collateral References

Insurance—363-370.

45 C.J.S. Insurance §§ 638-640.

29 Am. Jur. 905, Insurance, §§ 619 et seq.

40-3832. Nonforfeiture rights, old policies. (1) This section shall apply only to policies of life insurance issued prior to the operative date of section 40-3831 (standard nonforfeiture law).

(2) In event of default in payment of any premium due on any policy, provided not less than three (3) full years' premiums shall have been paid, there shall be secured to the insured, without action on his part, either paid-up or extended insurance as specified in the policy, the net value of which shall be at least equal to the entire net reserve held by the insurer of such policy, less two and one-half per cent (2½%) of the amount insured by the policy and dividend additions, if any, and less any outstanding indebtedness to the insurer on the policy at time of default. There shall be secured to the insured the right to surrender the policy to the insurer at its home office within one (1) month after date of default

for cash value otherwise available for the purchase of the paid-up or extended insurance as aforesaid.

History: En. Sec. 326, Ch. 286, L. 1959.

Compiler's Note

The operative date to which reference is made in subd. (1) is January 1, 1948.

40-3833. Prohibited policy plans. (1) No insurer shall issue for delivery or deliver in this state any life insurance policy or annuity contract issued under any plan for the segregation of policyholders into mathematical groups and providing benefits for a surviving policyholder of a group arising out of the death of another policyholder of such group, or under any other similar plan.

(2) No insurer shall issue for delivery or deliver in this state any life insurance policy or annuity contract providing benefits or values for surviving or continuing policyholders contingent upon the lapse or termination of the policies of other policyholders, whether by death or otherwise. This provision shall not be deemed to prohibit the payment or allowance of regular annual dividends or "savings" under participating forms of policies or contracts, nor prohibit the annual distribution to policyholders or beneficiaries of sums representing in part gains to the insurer from lapses, surrenders or mortality either in general or as resulting from particular classifications of policies.

History: En. Sec. 327, Ch. 286, L. 1959.

CHAPTER 39

GROUP LIFE INSURANCE

- Section 40-3901. Group contracts must meet group requirements.
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40-3901. Group contracts must meet group requirements. (1) No life insurance policy shall be delivered in this state insuring the lives of more than one individual unless to one of the groups as provided for in sections 40-3902 through 40-3906 of this chapter, and unless in compliance with the other applicable provisions of this chapter.

(2) Subsection (1) above, shall not apply to life insurance policies;

(a) Insuring only individuals related by blood, marriage or legal adoption; or

(b) Insuring only individuals having a common interest through ownership of a business enterprise, or a substantial legal interest or equity therein, and who are actively engaged in the management thereof; or

(c) Insuring only individuals otherwise having an insurable interest in each other's lives.

History: En. Sec. 328, Ch. 286, L. 1959.

40-3902. Employee groups. The lives of a group of individuals may be insured under a policy issued to an employer, or to the trustees of a fund established by an employer, which employer or trustees shall be deemed the policyholder, to insure employees of the employer for the benefit of persons other than the employer, subject to the following requirements:

(1) The employees eligible for insurance under the policy shall be all of the employees of the employer, or all of any class or classes thereof determined by conditions pertaining to their employment. The policy may provide that the term "employees" shall include the employees of one or more subsidiary corporations, and the employees, individual proprietors, and partners of one or more affiliated corporations, proprietors or partnerships if the business of the employer and of such affiliated corporations, proprietors or partnerships is under common control. The policy may provide that the term "employees" shall include the individual proprietor or partners if the employer is an individual proprietor or a partnership. The policy may provide that the term "employees" shall include retired employees. No director of a corporate employer shall be eligible for insurance under the policy unless such person is otherwise eligible as a bona fide employee of the corporation, by performing services other than the usual duties of a director. No individual proprietor or partner shall be eligible for insurance under the policy unless he is actively engaged in and devotes a substantial part of his time to the conduct of the business of the proprietor or partnership.

(2) The premium for the policy shall be paid by the policyholder, either wholly from the employer's funds or funds contributed by him, or partly from such funds and partly from funds contributed by the insured employees. No policy may be issued on which the entire premium is to be derived from funds contributed by the insured employees. A policy on which part of the premium is to be derived from funds contributed by the insured employees may be placed in force only if at least seventy-five per cent (75%) of the then eligible employees, excluding any as to whom evidence of individual insurability is not satisfactory to the insurer, elect to make the required contribution. A policy on which no part of the premium is to be derived from funds contributed by the insured employees must insure all eligible employees, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

(3) The policy must cover at least ten (10) employees at date of issue.

(4) The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the employees or by the employer or trustees.

History: En. Sec. 329, Ch. 286, L. 1959.

40-3903. Labor union groups. The lives of a group of individuals may be insured under a policy issued to a labor union, which shall be deemed the policyholder, to insure members of such union for the benefit of persons other than the union or any of its officials, representatives or agents, subject to the following requirements:

(1) The members eligible for insurance under the policy shall be all of the members of the union, or all of any class or classes thereof determined by conditions pertaining to their employment, or to membership in the union, or both.

(2) The premium for the policy shall be paid by the policyholder, either wholly from the union's funds, or partly from such funds and partly from funds contributed by the insured members specifically for their insurance. No policy may be issued on which the entire premium is to be derived from funds contributed by the insured members specifically for their insurance. A policy on which part of the premium is to be derived from funds contributed by the insured members specifically for their insurance may be placed in force only if at least seventy-five per cent (75%) of the then eligible members, excluding any as to whom evidence of individual insurability is not satisfactory to the insurer, elect to make the required contributions. A policy on which no part of the premium is to be derived from funds contributed by the insured members specifically for their insurance must insure all eligible members, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

(3) The policy must cover at least twenty-five (25) members at date of issue.

(4) The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the members or by the union.

History: En. Sec. 330, Ch. 286, L. 1959.

Collateral References

Group life insurance policy for benefit of union members. 17 ALR 2d 927.

40-3904. Trustee groups. The lives of a group of individuals may be insured under a policy issued to the trustees of a fund established by two (2) or more employers or by one (1) or more labor unions, or by one or more employers and one or more labor unions, which trustees shall be deemed the policyholder, to insure employees of the employers or members of the unions for the benefit of persons other than the employers or the unions, subject to the following requirements:

(1) The persons eligible for insurance shall be all of the employees of the employers or all of the members of the unions, or all of any class or classes thereof determined by conditions pertaining to their employment, or to membership in the unions, or to both. The policy may provide that the term "employees" shall include retired employees, and the individual proprietor or partners if an employer is an individual proprietor or a partnership. No director of a corporate employer shall be eligible for insurance under the policy unless such person is otherwise eligible as a bona fide employee of the corporation by performing services other

than usual duties of a director. No individual proprietor or partner shall be eligible for insurance under the policy unless he is actively engaged in and devotes a substantial part of his time to the conduct of the business of the proprietor or partnership. The policy may provide that the term "employees" shall include the trustees or their employees, or both, if their duties are principally connected with such trusteeship.

(2) The premium for the policy shall be paid by the trustees wholly from funds contributed by the employer or employers of the insured persons, or by the union or unions, or by both, or partly from such funds and partly from funds contributed by the insured persons. No policy may be issued on which the entire premium is to be derived from funds contributed by the insured persons specifically for their insurance. A policy on which part of the premium is to be derived from funds contributed by the insured persons specifically for their insurance may be placed in force only if at least seventy-five per cent (75%) of the then eligible persons, excluding any as to whom evidence of individual insurability is not satisfactory to the insurer, elect to make the required contributions. A policy on which no part of the premium is to be derived from funds contributed by the insured persons specifically for their insurance must insure all eligible persons or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

(3) The policy must cover at date of issue at least one hundred (100) persons and not less than an average of five (5) persons per employer unit; and if the fund is established by the members of an association of employers the policy may be issued if:

(a) Either

(i) The participating employers constitute at date of issue at least sixty per cent (60%) of those employer members whose employees are not already covered for group life insurance, or

(ii) The total number of persons covered at date of issue exceeds six hundred (600); and

(b) The policy shall not require that, if a participating employer discontinues membership in the association, the insurance of his employees shall cease solely by reason of such discontinuance.

(4) The amounts of insurance under the policy must be based upon some plan precluding individual selection either by the insured persons or by the policyholder, employers, or unions.

History: En. Sec. 331, Ch. 286, L. 1959.

40-3905. Public employee groups. The lives of a group of individuals may be insured under a policy issued to an incorporated city, town, or village, or an association or league of cities, towns or villages, an independent school district, state college or university, any association of state employees, and any association of state, county and city, town or village employees, and any combination of state, county, or city, town or village employees, and any department of the state or county government, which employer or association shall be deemed the policyholder, to insure the employees of any such incorporated city, town or village, of any such independent school district, of any such state college and university, or of

any such department of the state or county government, or members of any association of state, county, or city, town or village employees, for the benefit of persons other than the policyholder subject to the following requirements:

(1) The employees eligible for insurance under the policy shall be all of the employees of the employer or all of any class or classes thereof determined by conditions pertaining to their employment. The policy may provide that the term "employees" shall include retired employees.

(2) The premium for the policy shall be paid by the policyholder, wholly from funds contributed by it as employer or partly from such funds and partly from funds contributed by the insured employees or wholly from funds contributed by the insured employees, except that:

(a) The employer may deduct from the employees' salaries the required contributions for the premiums when authorized in writing by the respective employees so to do; and

(b) The premium for the policy may be paid by the policyholder wholly or partly from funds contributed by any incorporated city, town or village policyholder when authorized by the charter of such city, town or village or as otherwise authorized by law.

(3) Such policy may be placed in force only if at least seventy-five per cent (75%) of the eligible employees, excluding any as to whom evidence of individual insurability is not satisfactory to the insurer, elect to make the required premium contributions and become insured thereunder.

(4) The policy must cover at least ten (10) employees at date of issue.

(5) A policy issued to insure the employees of a public body may provide that the term "employees" shall include elected or appointed officials.

History: En. Sec. 332, Ch. 286, L. 1959.

40-3906. Debtor groups. The lives of a group of individuals may be insured under a policy issued to a creditor, who shall be deemed the policyholder, to insure the debtors of the creditor, subject to the following requirements:

(1) The debtors eligible for insurance under the policy shall be all of the debtors of the creditor whose indebtedness is repayable either (a) in installments, or (b) in one sum at the end of a period not in excess of eighteen months from the initial date of the debt, or all of any class or classes thereof determined by conditions pertaining to the indebtedness or the purchase giving rise to the indebtedness. The policy may provide that the term "debtors" shall include the debtors of one or more subsidiary corporations, and the debtors of one or more affiliated corporations, proprietors or partnerships if the business of the policyholder and of such affiliated corporations, proprietors or partnerships is under common control.

(2) The premium for the policy shall be paid by the policyholder, either from the creditor's funds, or from charges collected from the insured debtors, or from both. A policy on which part or all of the premium is to be derived from the collection from the insured debtors of identifiable charges not required of uninsured debtors shall not include, in the class or classes of debtors eligible for insurance, debtors under obligations out-

standing at its date of issue without evidence of individual insurability unless at least seventy-five per cent of the then eligible debtors elect to pay the required charges. A policy on which no part of the premium is to be derived from the collection of such identifiable charges must insure all eligible debtors, or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

(3) The policy may be issued only if the group of eligible debtors is then receiving new entrants at the rate of at least one hundred (100) persons yearly, or may reasonably be expected to receive at least one hundred new entrants during the first policy year, and only if the policy reserves to the insurer the right to require evidence of individual insurability if less than seventy-five per cent (75%) of the new entrants become insured. The policy may exclude from the classes eligible for insurance classes of debtors determined by age.

(4) The amount of insurance in the life of any debtor shall at no time exceed the amount owed by him to the creditor, or ten thousand dollars (\$10,000), whichever is less. Where the indebtedness is repayable in one sum to the creditor, the insurance on the life of any debtor shall in no instance be in effect for a period in excess of eighteen months, except that such insurance may be continued for an additional period not exceeding six months in the case of default, extension or recasting of the loan.

(5) The insurance shall be payable to the policyholder. Each payment shall reduce or extinguish the unpaid indebtedness of the debtor to the extent of such payment.

History: En. Sec. 333, Ch. 286, L. 1959.

40-3907. Credit union group. The lives of a group of individuals may be insured under a policy issued to a credit union organized pursuant to the laws of the state of Montana or the Federal Credit Union Act, which shall be deemed the policyholder, to insure eligible members for amounts of insurance not in excess of the share balance of each member, based upon some plan which will preclude individual selection, for the benefit of someone other than the credit union or its officials and subject to the following requirements:

(1) The members eligible for insurance under the policy shall be all the members of the credit union who meet standard physical requirement conditions of the insurer, or all of any class or classes thereof determined by conditions pertaining to their age, or to membership in the credit union or both.

(2) The premiums for the policy shall be paid by the policyholder, either wholly from the credit union's funds, or partly from such funds and partly from funds contributed by the insured members specifically for their insurance. No policy may be issued on which the entire premium is to be derived from funds contributed by the insured members specifically for their insurance. A policy on which part of the premium is to be derived from funds contributed by the insured members specifically for their insurance may be placed only if at least seventy-five per cent (75%) of the then eligible members, excluding any as to whom evidence of individual insurability is not satisfactory to the insured, elect to make the required

contribution. A policy on which no part of the premium is to be derived from funds contributed by the insured members specifically for their insurance must insure all eligible members or all except any as to whom evidence of individual insurability is not satisfactory to the insurer.

(3) The policy must cover at least twenty-five (25) members at the date of issue.

History: En. Sec. 334, Ch. 286, L. 1959.

40-3908. Limit as to amount. No such policy of group life insurance may be issued to an employer, or to a labor union, or to the trustees of a fund established in whole or in part by an employer or a labor union, which provides term insurance on any person which together with any other term insurance under any group life insurance policy or policies issued to the employers of such person or to a labor union or labor unions of which such person is a member or to the trustees of a fund or funds established in whole or in part by such employer or employers or such labor union or labor unions, exceeds twenty thousand dollars (\$20,000), unless one hundred and fifty per cent (150%) of the annual compensation of such person from his employer or employers exceeds twenty thousand dollars (\$20,000), in which event all such term insurance shall not exceed forty thousand dollars (\$40,000) or one hundred and fifty per cent (150%) of such annual compensation, whichever is the lesser.

History: En. Sec. 335, Ch. 286, L. 1959.

40-3909. Dependents' coverage. Any group life policy issued under section 40-3902 (employee groups), or 40-3903 (labor union groups) or 40-3904 (trustee groups) may be extended to insure the employees or members against loss due to the death of their spouses and minor children, or any class or classes thereof, subject to the following requirements:

(1) The premium for the insurance shall be paid by the policyholder, either from the employer's or union's funds or funds contributed by the employer or union, or from funds contributed by the insured employees or members, or from both. If any part of the premium is to be derived from funds contributed by the insured employees or members, the insurance with respect to spouses and children may be placed in force only if at least seventy-five per cent (75%) of the then eligible employees or members, excluding any as to whose family members evidence of insurability is not satisfactory to the insurer, elect to make the required contribution. If no part of the premium is to be derived from funds contributed by the employees or members, all eligible employees or members, excluding any as to whose family members evidence of insurability is not satisfactory to the insurer, must be insured with respect to their spouses and children.

(2) The amounts of insurance must be based upon some plan precluding individual selection either by the employees or members or by the policyholder, employer or union, and shall not exceed, with respect to any spouse or child, the amount shown in the following schedule:

Age of Family Member at Death	Maximum Amount of Insurance
Under 6 months	\$ 100
6 months and under 2 years	200
2 years and under 3 years	400
3 years and under 4 years	600
4 years and under 5 years	800
5 years and over	1,000

(3) Upon termination of the insurance with respect to the members of the family of any employee or member by reason of the employee's or member's termination of employment, termination of membership in the class or classes eligible for coverage under the policy, or death, the spouse shall be entitled to have issued by the insurer, without evidence of insurability, an individual policy of life insurance, without disability or other supplementary benefits, providing application for the individual policy shall be made, and the first premium paid to the insurer, within thirty-one days after such termination, subject to the requirements of subdivisions (1), (2) and (3) of section 40-3917 of this chapter. If the group policy terminates or is amended so as to terminate the insurance of any class of employees or members and the employee or member is entitled to have issued an individual policy under section 40-3919 of this chapter, the spouse shall also be entitled to have issued by the insurer an individual policy, subject to the conditions and limitations provided above. If the spouse dies within the period during which he would have been entitled to have an individual policy issued in accordance with this provision, the amount of life insurance which he would have been entitled to have issued under such individual policy shall be payable as a claim under the group policy, whether or not application for the individual policy or the payment of the first premium therefor has been made.

(4) Notwithstanding section 40-3917 of this chapter, only one certificate need be issued for delivery to an insured person if a statement concerning any dependent's coverage is included in such certificate.

History: En. Sec. 336, Ch. 286, L. 1959.

40-3910. Provisions required in group contracts. No policy of group life insurance shall be delivered in this state unless it contains in substance the provisions set forth in sections 40-3911 through 40-3920 of this chapter or provisions which in the opinion of the commissioner are more favorable to the persons insured, or at least as favorable to the persons insured and more favorable to the policyholder; except, however, that:

(1) Sections 40-3916 to 40-3920 inclusive shall not apply to policies issued to a creditor to insure debtors of such creditor;

(2) The standard provisions required for individual life insurance policies shall not apply to group life insurance policies; and

(3) If the group life insurance policy is on a plan of insurance other than the term plan, it shall contain a nonforfeiture provision or provisions which in the opinion of the commissioner is or are equitable to the insured persons and to the policyholder, but nothing herein shall be con-

strued to require that group life insurance policies contain the same non-forfeiture provisions as are required for individual life insurance policies.

History: En. Sec. 337, Ch. 286, L. 1959.

44 C.J.S. Insurance § 251.

Collateral References

29A Am. Jur. 833, Insurance, §§ 1758 et seq.

Insurance 169.

40-3911. Grace period. The group life insurance policy shall contain a provision that the policyholder is entitled to a grace period of thirty-one (31) days for the payment of any premium due except the first, during which grace period the death benefit coverage shall continue in force, unless the policyholder shall have given the insurer written notice of discontinuance in advance of the date of discontinuance and in accordance with the terms of the policy. The policy may provide that the policyholder shall be liable to the insurer for the payment of a pro rata premium for the time the policy was in force during such grace period.

History: En. Sec. 338, Ch. 286, L. 1959.

where last day falls on Sunday or holiday.
53 ALR 2d 877.

Collateral References

Time for payment of insurance premium

40-3912. Incontestability. The group life insurance policy shall contain a provision that the validity of the policy shall not be contested, except for nonpayment of premium, after it has been in force for two (2) years from its date of issue; and that no statement made by any person insured under the policy relating to his insurability shall be used in contesting the validity of the insurance with respect to which such statement was made after such insurance has been in force prior to the contest for a period of two (2) years during such person's lifetime nor unless it is contained in a written instrument signed by him.

History: En. Sec. 339, Ch. 286, L. 1959.

vision of life or accident policy relating to aeronautics. 17 ALR 2d 1050.

Collateral References

Incontestable clause as applicable to suit to reform insurance policy. 7 ALR 2d 504.

Incontestability clause as affecting pro-

vision of life or accident policy relating to aeronautics. 17 ALR 2d 1050.
Incontestability clause as precluding insurer from defending on ground of particular clause and life policy limiting or precluding insurer's liability because of other life insurance. 22 ALR 2d 809.

40-3913. Application—statements deemed representations. The group life insurance policy shall contain a provision that a copy of the application, if any, of the policyholder shall be attached to the policy when issued, that all statements made by the policyholder or by the persons insured shall be deemed representations and not warranties, and that no statement made by any person insured shall be used in any contest unless a copy of the instrument containing the statement is or has been furnished to such person or to his beneficiary.

History: En. Sec. 340, Ch. 286, L. 1959.

40-3914. Insurability. The group life insurance policy shall contain a provision setting forth the conditions, if any, under which the insurer reserves the right to require a person eligible for insurance to furnish evidence of individual insurability satisfactory to the insurer as a condition to part or all of his coverage.

History: En. Sec. 341, Ch. 286, L. 1959.

40-3915. Misstatement of age. The group life insurance policy shall contain a provision specifying an equitable adjustment of premiums or of benefits or of both to be made in the event the age of a person insured has been misstated, such provision to contain a clear statement of the method of adjustment to be used.

History: En. Sec. 342, Ch. 286, L. 1959.

40-3916. Payment of benefits. The group life insurance policy shall contain a provision that any sum becoming due by reason of the death of the person insured shall be payable to the beneficiary designated by the person insured, subject to the provisions of the policy in the event there is no designated beneficiary as to all or any part of such sum living at the death of the person insured, and subject to any right reserved by the insurer in the policy and set forth in the certificate to pay at its option a part of such sum not exceeding five hundred dollars (\$500) to any person appearing to the insurer to be equitably entitled thereto by reason of having incurred funeral or other expenses incident to the last illness or death of the person insured.

History: En. Sec. 343, Ch. 286, L. 1959.

Collateral References

Change of beneficiary in old line insur-

ance policy as affected by failure to comply with requirements as to manner of making change. 19 ALR 2d 5.

40-3917. Certificate. The group life insurance policy shall contain a provision that the insurer will issue to the policyholder for delivery to each person insured an individual certificate setting forth a statement as to the insurance protection to which he is entitled, to whom the insurance benefits are payable, and the rights and conditions set forth in sections 40-3918, 40-3919 and 40-3920.

History: En. Sec. 344, Ch. 286, L. 1959.

40-3918. Conversion on termination of eligibility. The group life insurance policy shall contain a provision that if the insurance, or any portion of it, on a person covered under the policy ceases because of termination of employment or of membership in the class or classes eligible for coverage under the policy, such person shall be entitled to have issued to him by the insurer, without evidence of insurability, an individual policy of life insurance without disability or other supplementary benefits, provided application for the individual policy shall be made, and the first premium paid to the insurer, within thirty-one (31) days after such termination, and provided further that:

(1) The individual policy shall, at the option of such person, be on any one of the forms, except term insurance, then customarily issued by the insurer at the age and for the amount applied for;

(2) The individual policy shall be in an amount not in excess of the amount of life insurance which ceases because of such termination, less the amount of any life insurance for which such person is or becomes eligible under any other group policy within thirty-one (31) days after such termination, provided that any amount of insurance which shall have matured on or before the date of such termination as an endowment payable to the person insured, whether in one sum or in installments or in the form

of an annuity, shall not, for the purposes of this provision, be included in the amount which is considered to cease because of such termination; and

(3) The premium on the individual policy shall be at the insurer's then customary rate applicable to the form and amount of the individual policy, to the class of risk to which such person then belongs, and to his age attained on the effective date of the individual policy.

History: En. Sec. 345, Ch. 286, L. 1959.

Collateral References

Failure of employer or insurer to notify employee dropped from payroll of necessity for and time of contribution to group insurance premium. 2 ALR 2d 852.

Effective date of group life insurance, as to individual policies of employees. 35 ALR 2d 798.

Termination of coverage under group policy with regard to termination of employment. 68 ALR 2d 8.

40-3919. Conversion on termination of policy. The group life insurance policy shall contain a provision that if the group policy terminates or is amended so as to terminate the insurance of any class of insured persons, every person insured thereunder at the date of such termination whose insurance terminates and who has been so insured for at least five (5) years prior to such termination date shall be entitled to have issued to him by the insurer an individual policy of life insurance, subject to the same conditions and limitations as are provided by section 40-3918, except that the group policy may provide that the amount of such individual policy shall not exceed the smaller of:

(1) The amount of the person's life insurance protection ceasing because of the termination or amendment of the group policy, less the amount of any life insurance for which he is or becomes eligible under any group policy issued or reinstated by the same or another insurer within thirty-one (31) days after such termination, and

(2) Two thousand dollars (\$2,000).

History: En. Sec. 346, Ch. 286, L. 1959.

Collateral References

Rights as between insurer and employer in respect of termination of group annuity insurance agreement. 41 ALR 2d 772.

Right to cancel or modify master policy so as to terminate coverage under group policy as dependent on notice to employee. 68 ALR 2d 266.

40-3920. Death pending conversion. The group life insurance policy shall contain a provision that if a person insured under the policy dies during the period within which he would have been entitled to have an individual policy issued to him in accordance with section 40-3918 or 40-3919 and before such an individual policy shall have become effective, the amount of life insurance which he would have been entitled to have issued to him under such individual policy shall be payable as a claim under the group policy, whether or not application for the individual policy or the payment of the first premium therefor has been made.

History: En. Sec. 347, Ch. 286, L. 1959.

40-3921. Notice as to conversion right. If any individual insured under a group life insurance policy hereafter delivered in this state becomes entitled under the terms of such policy to have an individual policy of life insurance issued to him without evidence of insurability, subject to making of application and payment of the first premium within the period specified in such policy, and if such individual is not given notice of the existence

of such right at least fifteen (15) days prior to the expiration date of such period, then, in such event the individual shall have an additional period within which to exercise such right, but nothing herein contained shall be construed to continue any insurance beyond the period provided in such policy. This additional period shall expire fifteen (15) days next after the individual is given such notice, but in no event shall such additional period extend beyond sixty (60) days next after the expiration date of the period provided in such policy. Written notice presented to the individual or mailed by the policyholder to the last known address of the individual or mailed by the insurer to the last known address of the individual as furnished by the policyholder shall constitute notice for the purpose of this section.

History: En. Sec. 348, Ch. 286, L. 1959.

Collateral References

Failure of employer or insurer to notify employee dropped from payroll of necessity for and time of contribution to group insurance premium. 2 ALR 2d 852.

Duty to inform employee of termination of employment and consequent termination of his insurance coverage under group policy. 68 ALR 2d 26.

40-3922. "Employee life insurance" defined. "Employee life insurance" is that plan of life insurance, other than salary savings life insurance or pension trust insurance and annuities, under which individual policies are issued to the employees of any employer and where such policies are issued on the lives of not less than five (5) employees at date of issue. Premiums for such policies shall be paid by the employer or the trustee of a fund established by the employer either wholly from the employer's funds, or funds contributed by him, or partly from such funds and partly from funds contributed by the insured employees.

History: En. Sec. 349, Ch. 286, L. 1959.

40-3923. Violations. Violations of this chapter are subject to the penalties provided by section 40-2617 (general penalty).

History: En. Sec. 350, Ch. 286, L. 1959.

CHAPTER 40

DISABILITY INSURANCE POLICIES

Section	40-4001.	Scope of chapter.
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- 40-4031. Conforming to statute.
- 40-4032. Age limit.
- 40-4033. Franchise disability insurance law.
- 40-4034. Violations.

40-4001. Scope of chapter. Nothing in this chapter shall apply to or affect:

(1) Any policy of liability or workmen's compensation insurance with or without supplementary expense coverage therein.

(2) Any group or blanket policy.

(3) Life insurance, endowment or annuity contracts, or contracts supplemental thereto which contain only such provisions relating to disability insurance as:

(a) Provide additional benefits in case of death or dismemberment or loss of sight by accident or accidental means, or as

(b) Operate to safeguard such contracts against lapse, or to give a special surrender value or special benefit or an annuity in the event that the insured or annuitant becomes totally and permanently disabled, as defined by the contract or supplemental contract.

(4) Reinsurance.

History: En. Sec. 351, Ch. 286, L. 1959.

40-4002. Scope, format of policy. No policy of disability insurance shall be delivered or issued for delivery to any person in this state unless it otherwise complies with this code, and complies with the following:

(1) The entire money and other considerations therefor shall be expressed therein;

(2) The time when the insurance takes effect and terminates shall be expressed therein;

(3) It shall purport to insure only one person, except that a policy may insure, originally or by subsequent amendment, upon the application of an adult member of a family, who shall be deemed the policyholder, any two (2) or more eligible members of that family, including husband, wife, dependent children or any children under a specified age which shall not exceed nineteen years and any other person dependent upon the policyholder;

(4) The style, arrangement and over-all appearance of the policy shall give no undue prominence to any portion of the text, and every printed portion of the text of the policy and of any endorsements or attached papers shall be plainly printed in light-faced type of a style in general use, the size of which shall be uniform and not less than ten (10) point with a lower case unspaced alphabet length not less than one hundred and twenty

(120) point (the "text" shall include all printed matter except the name and address of the insurer, name or title of the policy, the brief description, if any, and captions and subcaptions);

(5) The exceptions and reductions of indemnity shall be set forth in the policy and, other than those contained in sections 40-4004 to 40-4026, inclusive, of this chapter, shall be printed, at the insurer's option, either included with the benefit provision to which they apply, or under an appropriate caption such as "Exceptions," or "Exceptions and Reductions," except that if an exception or reduction specifically applies only to a particular benefit of the policy, a statement of such exception or reduction shall be included with the benefit provision to which it applies;

(6) Each such form, including riders and endorsements, shall be identified by a form number in the lower left-hand corner of the first page thereof;

(7) The policy shall contain no provision purporting to make any portion of the charter, rules, constitution or bylaws of the insurer a part of the policy unless such portion is set forth in full in the policy, except in the case of the incorporation of, or reference to, a statement of rates or classification of risks, or short-rate table filed with the commissioner.

History: En. Sec. 352, Ch. 286, L. 1959.

40-4003. Required provisions—captions—omissions—substitutions. (1) Except as provided in subsection (2) below, each such policy delivered or issued for delivery to any person in this state shall contain the provisions specified in sections 40-4004 to 40-4015, inclusive, of this chapter, in the words in which the same appear; except, that the insurer may, at its option, substitute for one or more of such provisions corresponding provisions of different wording approved by the commissioner which are in each instance not less favorable in any respect to the insured or the beneficiary. Each such provision shall be preceded individually by the applicable caption shown, or, at the option of the insurer, by such appropriate individual or group captions or subcaptions as the commissioner may approve.

(2) If any such provision is in whole or in part inapplicable to or inconsistent with the coverage provided by a particular form of policy, the insurer, with the approval of the commissioner, shall omit from such policy any inapplicable provision or part of a provision and shall modify any inconsistent provision or part of a provision in such manner as to make the provision as contained in the policy consistent with the coverage provided by the policy.

History: En. Sec. 353, Ch. 286, L. 1959.

44 C.J.S. Insurance § 251.

29A Am. Jur. 301, Insurance, §§ 1154 et seq.

Collateral References

InsuranceⒸ449.

40-4004. Entire contract—changes. There shall be a provision as follows:

"Entire Contract; Changes: This policy, including the endorsements and the attached papers, if any, constitutes the entire contract of insurance. No change in this policy shall be valid until approved by an executive officer of the insurer and unless such approval be endorsed hereon or

attached hereto. No agent has authority to change this policy or to waive any of its provisions."

History: En. Sec. 354, Ch. 286, L. 1959.

40-4005. Time limit on certain defenses. There shall be a provision as follows:

"Time Limit on Certain Defenses: (1) After three years from the date of issue of this policy no misstatements, except fraudulent misstatements, made by the applicant in the application for such policy shall be used to void the policy or to deny a claim for loss incurred or disability (as defined in the policy) commencing after the expiration of such three-year period."

(The foregoing policy provision shall not be so construed as to affect any legal requirement for avoidance of a policy or denial of a claim during such initial three-year period, nor to limit the application of sections 40-4017 through 40-4021 of this chapter in the event of misstatement with respect to age or occupation or other insurance.)

(A policy which the insured has the right to continue in force subject to its terms by the timely payment of premium (a) until at least age fifty (50) or, (b) in the case of a policy issued after age forty-four (44), for at least five (5) years from its date of issue, may contain in lieu of the foregoing the following provision (from which the clause in parentheses may be omitted at the insurer's option) under the caption "Incontestable":

"After this policy has been in force for a period of three years during the lifetime of the insured (excluding any period during which the insured is disabled), it shall become incontestable as to the statements contained in the application."

(2) No claim for loss incurred or disability (as defined in the policy) commencing after three years from the date of issue of this policy shall be reduced or denied on the ground that a disease or physical condition not excluded from coverage by name or specific description effective on the date of loss had existed prior to the effective date of coverage of this policy."

History: En. Sec. 355, Ch. 286, L. 1959.

Collateral References

Incontestable clause as applicable to suit to reform insurance policy. 7 ALR 2d 504.

Incontestability clause as affecting provision of life or accident policy relating to aeronautics. 17 ALR 2d 1050.

40-4006. Grace period. There shall be a provision as follows:

"Grace Period: A grace period of . . . (insert a number not less than '7' for weekly premium policies, '10' for monthly premium policies and '31' for all other policies) days will be granted for the payment of each premium falling due after the first premium, during which grace period the policy shall continue in force."

A policy in which the insurer reserves the right to refuse renewal shall have, at the beginning of the above provision,

"Unless not less than thirty days prior to the premium due date the insurer has delivered to the insured or has mailed to his last address as shown by the records of the insurer written notice of its intention not to

renew this policy beyond the period for which the premium has been accepted."

History: En. Sec. 356, Ch. 286, L. 1959. where last day falls on Sunday or holiday.
53 ALR 2d 877.

Collateral References

Time for payment of insurance premium

40-4007. Reinstatement. There shall be a provision as follows:

"Reinstatement: If any renewal premium be not paid within the time granted the insured for payment, a subsequent acceptance of premium by the insurer or by any agent duly authorized by the insurer to accept such premium, without requiring in connection therewith an application for reinstatement, shall reinstate the policy; provided, however, that if the insurer or such agent requires an application for reinstatement and issues a conditional receipt for the premium tendered, the policy will be reinstated upon approval of such application by the insurer or, lacking such approval, upon the forty-fifth (45th) day following the date of such conditional receipt unless the insurer has previously notified the insured in writing of its disapproval of such application. The reinstated policy shall cover only loss resulting from such accidental injury as may be sustained after the date of reinstatement and loss due to such sickness as may begin more than ten days after such date. In all other respects the insured and insurer shall have the same rights thereunder as they had under the policy immediately before the due date of the defaulted premium, subject to any provisions endorsed hereon or attached hereto in connection with the reinstatement. Any premium accepted in connection with a reinstatement shall be applied to a period for which premium has not been previously paid, but not to any period more than sixty (60) days prior to the date of reinstatement."

The last sentence of the above provision may be omitted from any policy which the insured has the right to continue in force subject to its terms by the timely payment of premiums:

- (1) Until at least age fifty (50), or
- (2) In the case of a policy issued after age forty-four (44), for at least five (5) years from its date of issue.

History: En. Sec. 357, Ch. 286, L. 1959.

40-4008. Notice of claim. There shall be a provision as follows:

"Notice of Claim: Written notice of claim must be given to the insurer within twenty (20) days after the occurrence or commencement of any loss covered by the policy, or as soon thereafter as is reasonably possible. Notice given by or on behalf of the insured or the beneficiary to the insurer at . . . (insert the location of such office as the insurer may designate for the purpose), or to any authorized agent of the insurer, with information sufficient to identify the insured, shall be deemed notice to the insurer."

In a policy providing a loss-of-time benefit which may be payable for at least two (2) years, an insurer may at its option insert the following between the first and second sentences of the above provision:

"Subject to the qualifications set forth below, if the insured suffers loss of time on account of disability for which indemnity may be payable for

at least two years, he shall, at least once in every six (6) months after having given notice of the claim, give to the insurer notice of continuance of the disability, except in the event of legal incapacity. The period of six (6) months following any filing of proof by the insured or any payment by the insurer on account of such claim or any denial of liability in whole or in part by the insurer shall be excluded in applying this provision. Delay in the giving of such notice shall not impair the insured's right to any indemnity which would otherwise have accrued during the period of six (6) months preceding the date on which such notice is actually given."

History: En. Sec. 358, Ch. 286, L. 1959.

DECISIONS UNDER FORMER LAW

Evidence Required

The provision in a health policy requiring written notice within ten days after commencement of disability from sickness, had to be read in connection with former section 40-606, providing that where preliminary proof of loss is required by a policy, the insured need not give such proof as is necessary in a court of justice, it being sufficient if he give the best evidence which it is in his power to give at the time; further, conditions may be such as to relieve insured from giving any notice whatever except that contained in his final proof of disability. *Wick v. Western Life & Casualty Co.*, 60 M 553, 556, 199 P 272.

Proof of Loss Distinguished

The terms "notice" and "proof of loss" within the meaning of a life insurance policy requiring both from one claiming disability benefits, are frequently used interchangeably, but they are distinct, proof being more formal and definite. This is made clear in the case of *Da Rin v. Casualty Company of America*, 41 M 175, 108 P 649, 137 Am. St. Rep. 709, 27 L. R. A. (N. S.) 1164, but prompt proof of loss may answer for notice. *Conlon v. Northern Life Insurance Co.*, 108 M 473, 488, 92 P 2d 284.

40-4009. Claim forms. There shall be a provision as follows:

"Claim Forms: The insurer, upon receipt of a notice of claim, will furnish to the claimant such forms as are usually furnished by it for filing proofs of loss. If such forms are not furnished within fifteen days after the giving of such notice the claimant shall be deemed to have complied with the requirements of this policy as to proof of loss upon submitting, within the time fixed in the policy for filing proofs of loss, written proof covering the occurrence, the character and the extent of the loss for which claim is made."

History: En. Sec. 359, Ch. 286, L. 1959.

40-4010. Proofs of loss. There shall be a provision as follows:

"Proofs of Loss: Written proof of loss must be furnished to the insurer at its said office in case of claim for loss for which this policy provides any periodic payment contingent upon continuing loss within ninety (90) days after the termination of the period for which the insurer is liable and in case of claim for any other loss within ninety (90) days after the date of such loss. Failure to furnish such proof within the time required shall not invalidate nor reduce any claim if it was not reasonably possible to give proof within such time, provided such proof is furnished as soon as reasonably possible and in no event, except in the absence of legal capacity, later than one (1) year from the time proof is otherwise required."

History: En. Sec. 360, Ch. 286, L. 1959.

DECISIONS UNDER FORMER LAW

Degree of Proof Required

The provision in a health policy requiring written notice within ten days after commencement of disability from sickness, must be read in connection with former section 40-606, providing that where preliminary proof of loss is required by a policy, the insured need not give such proof as is necessary in a court of justice, it being sufficient if he give the best evidence which it is in his power to give at the time; conditions may be such as to relieve insured from giving any notice whatever except that contained in his final proof of disability. *Wick v. Western Life & Casualty Co.*, 60 M 553, 556, 199 P 272.

Where preliminary proof is required under an insurance policy, the insured is not bound to give such proof as is necessary in a court of justice, the best evidence within his power to give at the time being sufficient to put the insurer upon inquiry to determine whether he is liable. *Caldwell v. Washington F. Nat. Ins. Co.*, 94 M 431, 443, 23 P 2d 257.

A letter received by an insurance company on the date of insured's death advising of insured's illness, one received on the following day asking for blanks on which to submit proof of loss of time due to sickness, and one advising the company of insured's death, held insufficient as formal proof of disability required under sick benefit provisions of life insurance policy. *Conlon v. Northern Life Insurance Co.*, 108 M 473, 492, 92 P 2d 284.

Form of Proof

"Due proof of loss" as a condition precedent to the right of recovery of any loss arising under a life insurance policy providing for disability benefits, does not require any particular form or proof which the insurer might arbitrarily demand, but such a statement of facts which, if established, would prima facie require payment of the claim. *Conlon v. Northern Life Insurance Co.*, 108 M 473, 489, 92 P 2d 284.

Presumption of Permanent Disability

Under a life insurance policy covering disability losses and declaring that total disability should be presumed to be permanent, inter alia, if it had existed for ninety days, the insured was entitled to receive disability payments so long as his disability continued even though he was gainfully employed when he instituted the action, as against the contention of insurer that benefits were payable only in case of absolutely permanent disability. *DeVore v. Mutual Life Ins., Co.*, 103 M 599, 610, 64 P 2d 1071.

Waiver of Defects in Proof

Where the insured has attempted to make proof of loss, even though it be insufficient or defective, the burden is cast upon the insurance company to make objection thereto, or it will be deemed to have waived the defect or insufficiency. *Caldwell v. Washington F. Nat. Ins. Co.*, 94 M 431, 443, 23 P 2d 257.

40-4011. Time of payment of claims. There shall be a provision as follows:

"Time of Payment of Claims: Indemnities payable under this policy for any loss other than loss for which this policy provides any periodic payment, will be paid immediately upon receipt of due written proof of such loss. Subject to due written proof of loss, all accrued indemnities for loss for which this policy provides periodic payment will be paid (insert period for payment which must not be less frequently than monthly) and any balance remaining unpaid upon the termination of liability will be paid immediately upon receipt of due written proof."

History: En. Sec. 361, Ch. 286, L. 1959.

40-4012. Payment of claims. There shall be a provision as follows:

"Payment of Claims: Indemnity for loss of life will be payable in accordance with the beneficiary designation and the provisions respecting such payment which may be prescribed herein and effective at the time of payment. If no such designation or provision is then effective, such indemnity shall be payable to the estate of the insured. Any other accrued indemnities unpaid at the insured's death may, at the option of the insurer,

be paid either to such beneficiary or to such estate. All other indemnities will be payable to the insured."

The following provisions, or either of them, may be included with the foregoing provision at the option of the insurer:

"If any indemnity of this policy shall be payable to the estate of the insured, or to an insured or beneficiary who is a minor or otherwise not competent to give a valid release, the insurer may pay such indemnity, up to an amount not exceeding \$..... (insert an amount which shall not exceed \$1,000), to any relative by blood or connection by marriage of the insured or beneficiary who is deemed by the insurer to be equitably entitled thereto. Any payment made by the insurer in good faith pursuant to this provision shall fully discharge the insurer to the extent of such payment."

"Subject to any written direction of the insured in the application or otherwise all or a portion of any indemnities provided by this policy on account of hospital, nursing, medical or surgical services may, at the insurer's option and unless the insured requests otherwise in writing not later than the time of filing proof of such loss, be paid directly to the hospital or person rendering such services; but it is not required that the service be rendered by a particular hospital or person."

History: En. Sec. 362, Ch. 286, L. 1959.

40-4013. Physical examination, autopsy. There shall be a provision as follows:

"Physical Examinations and Autopsy: The insurer at its own expense shall have the right and opportunity to examine the person of the insured when and as often as it may reasonably require during the pendency of a claim hereunder and to make an autopsy in case of death where it is not forbidden by law."

History: En. Sec. 363, Ch. 286, L. 1959. therefor under insurance policy. 30 ALR 2d 837.

Collateral References

Time for making autopsy or demand

40-4014. Legal actions. There shall be a provision as follows:

"Legal Actions: No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after written proof of loss has been furnished in accordance with the requirements of this policy. No such action shall be brought after the expiration of three (3) years after the written proof of loss is required to be furnished."

History: En. Sec. 364, Ch. 286, L. 1959. utory provision in relation to insurance, of provisions of statute of limitations extending time or fixing time when action deemed commenced. 149 ALR 483.

Collateral References

Applicability to limitation prescribed by policy of insurance, or by special stat-

40-4015. Change of beneficiary. There shall be a provision as follows:

"Change of Beneficiary: Unless the insured makes an irrevocable designation of beneficiary, the right to change a beneficiary is reserved to the insured and the consent of the beneficiary or beneficiaries shall not be

requisite to surrender or assignment of this policy or to any change of beneficiary or beneficiaries, or to any other changes in this policy.”

(The first clause of this provision, relating to the irrevocable designation of beneficiary, may be omitted at the insurer’s option.)

History: En. Sec. 365, Ch. 286, L. 1959.

40-4016. Optional policy provisions. Except as provided in subsection (2) of section 40-4003 of this chapter, no such policy delivered or issued for delivery to any person in this state shall contain provisions respecting the matters set forth in sections 40-4017 to 40-4026, inclusive, of this chapter unless such provisions are in the words in which the same appear in the applicable section, except that the insurer may, at its option, use in lieu of any such provision a corresponding provision of different wording approved by the commissioner which is not less favorable in any respect to the insured or the beneficiary. Any such provision contained in the policy shall be preceded individually by the appropriate caption or, at the option of the insurer, by such appropriate individual or group captions or subcaptions as the commissioner may approve.

History: En. Sec. 366, Ch. 286, L. 1959.

40-4017. Change of occupation. There may be a provision as follows:

“Change of Occupation: If the insured be injured or contract sickness after having changed his occupation to one classified by the insurer as more hazardous than that stated in this policy or while doing for compensation anything pertaining to an occupation so classified, the insurer will pay only such portion of the indemnities provided in this policy as the premium paid would have purchased at the rates and within the limits fixed by the insurer for such more hazardous occupation. If the insured changes his occupation to one classified by the insurer as less hazardous than that stated in this policy, the insurer, upon receipt of proof of such change of occupation, will reduce the premium rate accordingly, and will return the excess pro rata unearned premium from the date of change of occupation or from the policy anniversary date immediately preceding receipt of such proof, whichever is the more recent. In applying this provision, the classification of occupational risk and the premium rates shall be such as have been last filed by the insurer prior to the occurrence of the loss for which the insurer is liable or prior to date of proof of change in occupation with the state official having supervision of insurance in the state where the insured resided at the time this policy was issued; but if such filing was not required, then the classification of occupational risk and the premium rates shall be those last made effective by the insurer in such state prior to the occurrence of the loss or prior to the date of proof of change in occupation.”

History: En. Sec. 367, Ch. 286, L. 1959.

Collateral References

Construction and application of provision of accident policy or accident feature of life policy extending benefits to one disabled from engaging in any occupa-

tion or employment for wage or profit. 149 ALR 7.

Accident insurance policy provisions for diminution of indemnity where insured engages in, or does act pertaining to, more hazardous occupation. 8 ALR 2d 481.

40-4018. Misstatement of age. There may be a provision as follows:

"Misstatement of Age: If the age of the insured has been misstated, all amounts payable under this policy shall be such as the premium paid would have purchased at the correct age."

History: En. Sec. 368, Ch. 286, L. 1959.

40-4019. Other insurance in this insurer. There may be a provision as follows:

"Other Insurance in This Insurer: If an accident or sickness or accident and sickness policy or policies previously issued by the insurer to the insured be in force concurrently herewith, making the aggregate indemnity for (insert type of coverage or coverages) in excess of \$. (insert maximum limit of indemnity or indemnities) the excess insurance shall be void and all premiums paid for such excess shall be returned to the insured or to his estate."

Or, in lieu thereof:

"Insurance effective at any one time on the insured under a like policy or policies in this insurer is limited to the one such policy elected by the insured, his beneficiary or his estate, as the case may be, and the insurer will return all premiums paid for all other such policies."

History: En. Sec. 369, Ch. 286, L. 1959.

40-4020. Insurance with other insurers (Provision of Service or Expense Incurred Basis). (1) There may be a provision as follows:

"Insurance with Other Insurers: If there be other valid coverage, not with this insurer, providing benefits for the same loss on a provision of service basis or on an expense incurred basis and of which this insurer has not been given written notice prior to the occurrence or commencement of loss, the only liability under any expense incurred coverage of this policy shall be for such proportion of the loss as the amount which would otherwise have been payable hereunder plus the total of the like amounts under all such other valid coverages for the same loss of which this insurer had notice bears to the total like amounts under all valid coverages for such loss, and for the return of such portion of the premiums paid as shall exceed the pro rata portion for the amount so determined. For the purpose of applying this provision when other coverage is on a provision of service basis, the 'like amount' of such other coverage shall be taken as the amount which the services rendered would have cost in the absence of such coverage."

(2) If the foregoing policy provision is included in a policy which also contains the policy provision set out in section 40-4021 of this chapter there shall be added to the caption of the foregoing provision the phrase "—Expense Incurred Benefits." The insurer may, at its option, include in this provision a definition of "other valid coverage," approved as to form by the commissioner, which definition shall be limited in subject matter to coverage provided by organizations subject to regulation by insurance law or by insurance authorities of this or any other state of the United States or any province of Canada, and by hospital or medical service organizations, and to any other coverage the inclusion of which may be approved by the commissioner. In the absence of such definition such term

shall not include group insurance, automobile medical payments insurance, or coverage provided by hospital or medical service organizations or by union welfare plans or employer or employee benefit organizations. For the purpose of applying the foregoing policy provision with respect to any insured, any amount of benefit provided for such insured pursuant to any compulsory benefit statute (including any workmen's compensation or employer's liability statute) whether provided by a governmental agency or otherwise shall in all cases be deemed to be "other valid coverage" of which the insurer has had notice. In applying the foregoing policy provision no third-party liability coverage shall be included as "other valid coverage."

History: En. Sec. 370, Ch. 286, L. 1959.

40-4021. Insurance with other insurers—other benefits. (1) There may be a provision as follows:

"Insurance With Other Insurers: If there be other valid coverage, not with this insurer, providing benefits for the same loss on other than an expense incurred basis and of which this insurer has not been given written notice prior to the occurrence or commencement of loss, the only liability for such benefits under this policy shall be for such proportion of the indemnities otherwise provided hereunder for such loss as the like indemnities of which the insurer had notice (including the indemnities under this policy) bear to the total amount of all like indemnities for such loss, and for the return of such portion of the premium paid as shall exceed the pro rata portion for the indemnities thus determined."

(2) If the foregoing policy provision is included in a policy which also contains the policy provision set out in section 40-4020 of this chapter, there shall be added to the caption of the foregoing provision the phrase "—Other Benefits." The insurer may, at its option, include in this provision a definition of "other valid coverage," approved as to form by the commissioner, which definition shall be limited in subject matter to coverage provided by organizations subject to regulation by insurance law or by insurance authorities of this or any other state of the United States or any province of Canada, and to any other coverage the inclusion of which may be approved by the commissioner. In the absence of such definition such term shall not include group insurance, or benefits provided by union welfare plans or by employer or employee benefit organizations. For the purpose of applying the foregoing policy provision with respect to any insured, any amount of benefit provided for such insured pursuant to any compulsory benefit statute (including any workmen's compensation or employer's liability statute) whether provided by a governmental agency or otherwise shall in all cases be deemed to be "other valid coverage" of which the insurer has had notice. In applying the foregoing policy provision no third-party liability coverage shall be included as "other valid coverage."

History: En. Sec. 371, Ch. 286, L. 1959.

40-4022. Relation of earnings to insurance. (1) There may be a provision as follows:

"Relation of Earnings to Insurance: If the total monthly amount of loss of time benefits promised for the same loss under all valid loss of time coverage upon the insured, whether payable on a weekly or monthly basis, shall exceed the monthly earnings of the insured at the time disability commenced or his average monthly earnings for the period of two years immediately preceding a disability for which claim is made, whichever is the greater, the insurer will be liable only for such proportionate amount of such benefits under this policy as the amount of such monthly earnings or such average monthly earnings of the insured bears to the total amount of monthly benefits for the same loss under all such coverage upon the insured at the time such disability commences and for the return of such part of the premiums paid during such two years as shall exceed the pro rata amount of the premiums for the benefits actually paid hereunder; but this shall not operate to reduce the total monthly amount of benefits payable under all such coverage upon the insured below the sum of \$200 or the sum of the monthly benefits specified in such coverages, whichever is the lesser, nor shall it operate to reduce benefits other than those payable for loss of time."

(2) The foregoing policy provision may be inserted only in a policy which the insured has the right to continue in force subject to its terms by the timely payment of premiums (a) until at least age 50, or (b) in the case of a policy issued after age 44, for at least five years from its date of issue. The insurer may, at its option, include in this provision a definition of "valid loss of time coverage," approved as to form by the commissioner, which definition shall be limited in subject matter to coverage provided by governmental agencies or by organizations subject to regulation by insurance law or by insurance authorities of this or any other state of the United States or any province of Canada, or to any other coverage the inclusion of which may be approved by the commissioner or any combination of such coverages. In the absence of such definition such term shall not include any coverage provided for such insured pursuant to any compulsory benefit statute (including any workmen's compensation or employer's liability statute), or benefits provided by union welfare plans or by employer or employee benefit organizations.

History: En. Sec. 372, Ch. 286, L. 1959. health, or similar policy insuring against "loss of business time." 31 ALR 2d 1222.

Collateral References

Construction and effect of clause of life,

40-4023. Unpaid premiums. There may be a provision as follows:

"Unpaid Premiums: Upon the payment of a claim under this policy, any premium then due and unpaid or covered by any note or written order may be deducted therefrom."

History: En. Sec. 373, Ch. 286, L. 1959.

40-4024. Conformity with state statutes. There may be a provision as follows:

"Conformity with State Statutes: Any provision of this policy which, on its effective date is in conflict with the statutes of the state in which

the insured resides on such date is hereby amended to conform to the minimum requirements of such statutes."

History: En. Sec. 374, Ch. 286, L. 1959.

40-4025. Illegal occupation. There may be a provision as follows:

"Illegal Occupation: The insurer shall not be liable for any loss to which a contributing cause was the insured's commission of or attempt to commit a felony or to which a contributing cause was the insured's being engaged in an illegal occupation."

History: En. Sec. 375, Ch. 286, L. 1959.

taining a "violation of law" clause, for death or injury resulting from violation of law by insured. 23 ALR 2d 1105.

Collateral References

Liability under accident policy not con-

40-4026. Intoxicants and narcotics. There may be a provision as follows:

"Intoxicants and Narcotics: The insurer shall not be liable for any loss sustained or contracted in consequence of the insured's being intoxicated or under the influence of any narcotic unless administered on the advice of a physician."

History: En. Sec. 376, Ch. 286, L. 1959.

excluding or limiting liability in case of insured's use of intoxicants or narcotics. 13 ALR 2d 987.

Collateral References

Clause in life, accident, or health policy

40-4027. Renewal at option of insurer. Disability insurance policies, other than accident insurance only policies, in which the insurer reserves the right to refuse renewal on an individual basis, shall provide in substance in a provision thereof or in an endorsement thereon or rider attached thereto that subject to the right to terminate the policy upon non-payment of premium when due, such right to refuse renewal may not be exercised so as to take effect before the renewal date occurring on, or after and nearest, each policy anniversary (or in the case of lapse and reinstatement, at the renewal date occurring on, or after and nearest, each anniversary of the last reinstatement), and that any refusal of renewal shall be without prejudice to any claim originating while the policy is in force. (The parenthetic reference to lapse and reinstatement may be omitted at the insurer's option.)

History: En. Sec. 377, Ch. 286, L. 1959.

40-4028. Order of certain provisions. The provisions which are the subject of sections 40-4007 to 40-4030, inclusive, of this chapter, or any corresponding provisions which are used in lieu thereof in accordance with such sections, shall be printed in the consecutive order of the provisions in such sections or, at the option of the insurer, any such provision may appear as a unit in any part of the policy, with other provisions to which it may be logically related, provided that the resulting policy shall not be in whole or in part unintelligible, uncertain, ambiguous, abstruse, or likely to mislead a person to whom the policy is offered, delivered or issued.

History: En. Sec. 378, Ch. 286, L. 1959.

40-4029. Third-party ownership. The word "insured," as used in this chapter, shall not be construed as preventing a person other than the in-

sured with a proper insurable interest from making application for and owning a policy covering the insured or from being entitled under such a policy to any indemnities, benefits, and rights provided therein.

History: En. Sec. 379, Ch. 286, L. 1959.

40-4030. Requirement of other jurisdictions. (1) Any policy of a foreign or alien insurer, when delivered or issued for delivery to any person in this state, may contain any provision which is not less favorable to the insured or the beneficiary than the provisions of this chapter and which is prescribed or required by the law of the state or country under which the insurer is organized.

(2) Any policy of a domestic insurer may, when issued for delivery in any other state or country, contain any provision permitted or required by the laws of such other state or country.

History: En. Sec. 380, Ch. 286, L. 1959.

40-4031. Conforming to statute. (1) No policy provision which is not subject to this chapter shall make a policy, or any portion thereof, less favorable in any respect to the insured or the beneficiary than the provisions thereof which are subject to this chapter.

(2) A policy delivered or issued for delivery to any person in this state in violation of this chapter shall be held valid but shall be construed as provided in this chapter. When any provision in a policy subject to this chapter is in conflict with any provision of this chapter, the rights, duties, and obligations of the insurer, the insured and the beneficiary shall be governed by the provisions of this chapter.

History: En. Sec. 381, Ch. 286, L. 1959.

40-4032. Age limit. If any such policy contains a provision establishing, as an age limit or otherwise, a date after which the coverage provided by the policy will not be effective, and if such date falls within a period for which premium is accepted by the insurer or if the insurer accepts a premium after such date, the coverage provided by the policy will continue in force subject to any right of cancellation until the end of the period for which premium has been accepted. In the event the age of the insured has been misstated and if, according to the correct age of the insured, the coverage provided by the policy would not have become effective, or would have ceased prior to the acceptance of such premium or premiums, then the liability of the insurer shall be limited to the refund, upon request, of all premiums paid for the period not covered by the policy.

History: En. Sec. 382, Ch. 286, L. 1959.

Collateral References

Requirement of disability policy as to proof of disability before reaching specified age as barring recovery where disability occurs before, but proof is made

after, attainment of such age. 18 ALR 2d 1061.

Clause in health and accident, or similar policy reducing amount of periodic payments after insured reaches specified age, as applicable to disability incurred before such age is reached. 53 ALR 2d 552.

40-4033. Franchise disability insurance law. Disability insurance on a franchise plan is hereby declared to be that form of disability insurance issued to:

(1) Five or more employees of any corporation, copartnership, or individual employer or any governmental corporation, agency or department thereof; or

(2) Ten or more members, employees or employees of members of any trade or professional association or of a labor union or of any other association having had an active existence for at least two (2) years where such association or union has a constitution or bylaws and is formed in good faith for purposes other than that of obtaining insurance;

Where such persons with or without their dependents, are issued the same form of an individual policy varying only as to amounts and kinds of coverage applied for by such persons under an arrangement whereby the premiums on such policies may be paid to the insurer periodically by the employer, with or without payroll deductions, or by the association for its members, or by some designated person acting on behalf of such employer, association or union. The term "employees" as used herein may be deemed to include the officers, managers and employees and retired employees of the employer and the individual proprietor or partners if the employer is an individual proprietor or partnership.

History: En. Sec. 383, Ch. 286, L. 1959.

40-4034. Violations. Violations of this chapter are subject to the penalties provided by section 40-2617 (general penalty).

History: En. Sec. 384, Ch. 286, L. 1959.

CHAPTER 41

GROUP AND BLANKET DISABILITY INSURANCE

- Section 40-4101. "Group disability insurance" defined—eligible groups.
40-4102. Required provisions of group policies.
40-4103. Direct payment of hospital, medical services.
40-4104. "Blanket disability insurance" defined.
40-4105. Required provisions of blanket policies.
40-4106. Application and certificates not required.
40-4107. Insurable interest—facility of payment.

40-4101. "Group disability insurance" defined—eligible groups. Group disability insurance is hereby declared to be that form of disability insurance covering groups of persons as defined below, with or without one or more members of their families or one or more of their dependents, or covering one or more members of the families or one or more dependents of such groups of persons, and issued upon the following basis:

(1) Under a policy issued to an employer or trustees of a fund established by an employer, who shall be deemed the policyholder, insuring employees of such employer for the benefit of persons other than the employer. The term "employees" as used herein shall be deemed to include the officers, managers, and employees of the employer, the individual proprietor or partner if the employer is an individual proprietor or partnership, the officers, managers, and employees of subsidiary or affiliated corporations, the individual proprietors, partners and employees of individuals and firms, if the business of the employer and such individual or firm is under common control through stock ownership, contract, or otherwise. The term "em-

ployees" as used herein may include retired employees. A policy issued to insure employees of a public body may provide that the term "employees" shall include elected or appointed officials. The policy may provide that the term "employees" shall include the trustees or their employees, or both, if their duties are principally connected with such trusteeship.

(2) Under a policy issued to an association, including a labor union, which shall have a constitution and bylaws and which has been organized and is maintained in good faith for purposes other than that of obtaining insurance, insuring members, employees, or employees of members of the association for the benefit of persons other than the association or its officers or trustees. The term "employees" as used herein may include retired employees.

(3) Under a policy issued to the trustees of a fund established by two (2) or more employers in the same or related industry or by one or more labor unions or by one or more employers and one or more labor unions or by an association as defined in subdivision (2) above, which trustees shall be deemed the policyholder, to insure employees of the employers or members of the unions or of such association, or employees of members of such association, for the benefit of persons other than the employers or the unions or such association. The term "employees" as used herein may include the officers, managers and employees of the employer, and the individual proprietor or partners if the employer is an individual proprietor or partnership. The term "employees" as used herein may include retired employees. The policy may provide that the term "employees" shall include the trustees or their employees, or both, if their duties are principally connected with such trusteeship.

(4) Under a policy issued to any person or organization to which a policy of group life insurance may be issued or delivered in this state to insure any class or classes of individuals that could be insured under such group life policy.

(5) Under a policy issued to cover any other substantially similar group which, in the discretion of the commissioner, may be subject to the issuance of a group disability policy or contract.

(6) Any group disability policy which contains provisions for the payment by the insurer of benefits for expenses incurred on account of hospital, nursing, medical, or surgical services for members of the family or dependents of a person in the insured group may provide for the continuation of such benefit provisions, or any part or parts thereof, after the death of the person in the insured group.

History: En. Sec. 385, Ch. 286, L. 1959.

44 C.J.S. Insurance § 15.

Collateral References

29A Am. Jur. 833, Insurance, §§ 1758 et seq.

Insurance 169.

40-4102. Required provisions of group policies. Each such group disability insurance policy shall contain in substance the following provisions:

(1) A provision that, in the absence of fraud, all statements made by applicants or the policyholder or by an insured person shall be deemed representations and not warranties, and that no statement made for the purpose of effecting insurance shall avoid such insurance or reduce benefits

unless contained in a written instrument signed by the policyholder or the insured person, a copy of which has been furnished to such policyholder or to such person or his beneficiary.

(2) A provision that the insurer will furnish to the policyholder for delivery to each employee or member of the insured group, a statement in summary form of the essential features of the insurance coverage of such employee or member and to whom benefits thereunder are payable. If dependents are included in the coverage, only one certificate need be issued for each family unit.

(3) A provision that to the group originally insured may be added from time to time eligible new employees or members or dependents, as the case may be, in accordance with the terms of the policy.

History: En. Sec. 386, Ch. 286, L. 1959.

40-4103. Direct payment of hospital, medical services. Any group disability policy may on request by the group policyholder provide that all or any portion of any indemnities provided by any such policy on account of hospital, nursing, medical or surgical services may, at the insurer's option, be paid directly to the hospital or person rendering such services; but the policy may not require that the service be rendered by a particular hospital or person. Payment so made shall discharge the insurer's obligation with respect to the amount of insurance so paid.

History: En. Sec. 387, Ch. 286, L. 1959.

40-4104. "Blanket disability insurance" defined. Blanket disability insurance is hereby declared to be that form of disability insurance covering groups of persons as enumerated in one of the following subdivisions:

(1) Under a policy or contract issued to any common carrier or to any operator, owner or lessee of a means of transportation, who or which shall be deemed the policyholder, covering a group defined as all persons or all persons of a class who may become passengers on such common carrier or such means of transportation.

(2) Under a policy or contract issued to an employer, who shall be deemed the policyholder, covering all employees, dependents or guests, defined by reference to specified hazards incident to the activities or operations of the employer or any class of employees, dependents or guests similarly defined.

(3) Under a policy or contract issued to a school, or other institution of learning, camp or sponsor thereof; or to the head or principal thereof, who or which shall be deemed the policyholder, covering students or campers. Supervisors and employees may be included.

(4) Under a policy or contract issued in the name of any religious, charitable, recreational, educational, or civic organization, which shall be deemed the policyholder, covering participants in activities sponsored by the organization.

(5) Under a policy or contract issued to a sports team or sponsors thereof which shall be deemed the policyholder, covering members, officials and supervisors.

(6) Under a policy or contract issued in the name of any volunteer fire department, first aid, or other such volunteer group, or agency having

jurisdiction thereof, which shall be deemed the policyholder, covering all of the members of such fire department or group.

(7) Under a policy or contract issued to cover any other risk or class of risks which, in the discretion of the commissioner may be properly eligible for blanket disability insurance. The discretion of the commissioner may be exercised on an individual risk basis or class of risks, or both.

History: En. Sec. 388, Ch. 286, L. 1959.

Collateral References

Coverage and exception under student accident policy. 74 ALR 2d 1253.

40-4105. Required provisions of blanket policies. Any insurer authorized to write disability insurance in this state shall have the power to issue blanket disability insurance. No such blanket policy may be issued or delivered in this state unless a copy of the form thereof shall have been filed in accordance with section 40-3714. Every such blanket policy shall contain provisions which in the opinion of the commissioner are at least as favorable to the policyholder and the individual insured as the following:

(1) A provision that the policy and the application shall constitute the entire contract between the parties, and that all statements made by the policyholder shall, in absence of fraud, be deemed representations and not warranties, and that no such statements shall be used in defense to a claim under the policy, unless it is contained in a written application.

(2) A provision that written notice of sickness or of injury must be given to the insurer within twenty (20) days after the date when such sickness or injury occurred. Failure to give notice within such time shall not invalidate nor reduce any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible.

(3) A provision that the insurer will furnish to the policyholder such forms as are usually furnished by it for filing proof of loss. If such forms are not furnished before the expiration of fifteen (15) days after the giving of such notice, the claimant shall be deemed to have complied with the requirements of the policy as to proof of loss upon submitting within the time fixed in the policy for filing proof of loss, written proof covering the occurrence, character and extent of the loss for which claim is made.

(4) A provision that in the case of claim for loss of time for disability, written proof of such loss must be furnished to the insurer within thirty (30) days after the commencement of the period for which the insurer is liable, and that subsequent written proofs of the continuance of such disability must be furnished to the insurer at such intervals as the insurer may reasonably require, and that in the case of claim for any other loss, written proof of such loss must be furnished to the insurer within ninety (90) days after the date of such loss. Failure to furnish such proof within such time shall not invalidate nor reduce any claim if it shall be shown not to have been reasonably possible to furnish such proof and that such proof was furnished as soon as was reasonably possible.

(5) A provision that all benefits payable under the policy other than benefits for loss of time will be payable immediately upon receipt of due written proof of such loss, and that, subject to due proof of loss, all accrued

benefits payable under the policy for loss of time will be paid not later than at the expiration of each period of thirty (30) days during the continuance of the period for which the insurer is liable, and that any balance remaining unpaid at the termination of such period will be paid immediately upon receipt of such proof.

(6) A provision that the insurer at its own expense, shall have the right and opportunity to examine the person of the insured when and so often as it may reasonably require during the pendency of claim under the policy and also the right and opportunity to make an autopsy in case of death where it is not prohibited by law.

(7) A provision that no action at law or in equity shall be brought to recover under the policy prior to the expiration of sixty (60) days after written proof of loss has been furnished in accordance with the requirements of the policy and that no such action shall be brought after the expiration of three (3) years after the time written proof of loss is required to be furnished.

History: En. Sec. 389, Ch. 286, L. 1959.

Collateral References

Applicability to limitation prescribed by policy of insurance, or by special stat-

utory provision in relation to insurance, of provisions of statute of limitations extending time or fixing time when action deemed commenced. 149 ALR 483.

40-4106. Application and certificates not required. An individual application shall not be required from a person covered under a blanket disability policy or contract, nor shall it be necessary for the insurer to furnish each person a certificate.

History: En. Sec. 390, Ch. 286, L. 1959.

40-4107. Insurable interest—facility of payment. All benefits under any blanket disability policy shall be payable to the person insured, or to his designated beneficiary or beneficiaries, or to his estate; except, that if the person insured be a minor or mental incompetent, such benefits may be made payable to his parent, guardian, or other person actually supporting him; or if the entire cost of the insurance has been borne by the employer such benefits may be made payable to the employer. Provided, however, that the policy may provide that all or any portion of any indemnities provided by such policy on account of hospital, nursing, medical or surgical services may, at the insurer's option, be paid directly to the hospital or person rendering such services; but the policy may not require that the service be rendered by a particular hospital or person. Payment so made shall discharge the insurer's obligation with respect to the amount of insurance so paid.

History: En. Sec. 391, Ch. 286, L. 1959.

CHAPTER 42

CREDIT LIFE AND DISABILITY INSURANCE

- Section 40-4201. Purpose.
 40-4202. Short title.
 40-4203. Scope of chapter.
 40-4204. Definitions.
 40-4205. Forms of credit life insurance and credit disability insurance.

- 40-4206. Amount of credit life insurance and credit disability insurance.
- 40-4207. Term of credit life insurance and credit disability insurance.
- 40-4208. Provisions of policies and certificates of insurance—disclosure to debtors.
- 40-4209. Delivery of policy or certificate.
- 40-4210. Filing, approval and withdrawal of forms.
- 40-4211. Premiums and refunds.
- 40-4212. Issuance of policies.
- 40-4213. Claims.
- 40-4214. Existing insurance—choice of insurer.
- 40-4215. Enforcement.
- 40-4216. Judicial review.
- 40-4217. Penalties.

40-4201. Purpose. The purpose of this chapter is to promote the public welfare by regulating credit life insurance and credit disability insurance. Nothing in this chapter is intended to prohibit or discourage reasonable competition. The provisions of this chapter shall be liberally construed.

History: En. Sec. 392, Ch. 286, L. 1959.

44 C.J.S. Insurance § 10.

29 Am. Jur. 811, Insurance, § 490.

Collateral References

Insurance—591.

40-4202. Short title. This chapter may be cited as “the model act for the regulation of credit life insurance and credit disability insurance.”

History: En. Sec. 393, Ch. 286, L. 1959.

40-4203. Scope of chapter. All life insurance and all disability insurance sold in connection with loans or other credit transactions shall be subject to the provisions of this chapter except such insurance sold in connection with a loan or other credit transaction of more than five (5) years duration.

History: En. Sec. 394, Ch. 286, L. 1959.

40-4204. Definitions. For the purposes of this chapter: (1) “Credit life insurance” means insurance on the life of a debtor pursuant to or in connection with a specific loan or other credit transaction;

(2) “Credit disability insurance” means insurance on a debtor to provide indemnity for payments becoming due on a specific loan or other credit transaction while the debtor is disabled as defined in the policy;

(3) “Creditor” means the lender of money or vendor or lessor of goods, services, property, rights or privileges, for which payment is arranged through a credit transaction, or any successor to the right, title or interest of such lender, vendor or lessor;

(4) “Debtor” means a borrower of money or a purchaser or lessee of goods, services, property, rights or privileges for which payment is arranged through a credit transaction;

(5) “Indebtedness” means the total amount payable by a debtor to a creditor in connection with a loan or other credit transaction.

History: En. Sec. 395, Ch. 286, L. 1959.

40-4205. Forms of credit life insurance and credit disability insurance. Credit life insurance and credit disability insurance shall be issued only in the following forms:

(1) Individual policies of life insurance issued to debtors on the term plan;

(2) Individual policies of disability insurance issued to debtors on a term plan or disability provisions in individual life policies to provide such coverage;

(3) Group policies of life insurance issued to creditors providing insurance upon the lives of debtors on the term plan;

(4) Group policies of disability insurance issued to creditors on a term plan insuring debtors, or disability provisions in group life policies to provide such coverage.

History: En. Sec. 396, Ch. 286, L. 1959.

40-4206. Amount of credit life insurance and credit disability insurance. (1) Credit life insurance: The amount of credit life insurance shall not exceed the indebtedness. Where indebtedness repayable in substantially equal installments is secured by an individual policy of credit life insurance the amount of insurance shall not exceed the approximate unpaid indebtedness on the date of death and, where secured by a group policy of credit life insurance shall not exceed the exact amount of unpaid indebtedness on such date. Except, that agricultural loans not exceeding one year may be written up to the amount of the loan commitment on a nondecreasing or level term plan.

(2) Credit disability insurance: The amount of periodic indemnity payable by credit disability insurance in the event of disability, as defined in the policy, shall not exceed the aggregate of the periodic scheduled unpaid installments of indebtedness and shall not exceed the original indebtedness divided by the number of periodic installments.

History: En. Sec. 397, Ch. 286, L. 1959.

40-4207. Term of credit life insurance and credit disability insurance. The term of any credit life insurance or credit disability insurance shall, subject to acceptance by the insurer, commence on the date when the debtor becomes obligated to the creditor; except that, where a group policy provides coverage with respect to existing obligations, the insurance on a debtor with respect to such indebtedness shall commence on the effective date of the policy. The term of such insurance shall not extend more than fifteen (15) days beyond the scheduled maturity date of the indebtedness except when extended without additional cost to the debtor. If the indebtedness is discharged due to renewal or refinancing prior to the scheduled maturity date, the insurance in force shall be terminated before any new insurance may be issued in connection with the renewed or refinanced indebtedness. In all cases of termination prior to scheduled maturity, a refund shall be paid or credited as provided in section 40-4211.

History: En. Sec. 398, Ch. 286, L. 1959.

40-4208. Provisions of policies and certificates of insurance—disclosure to debtors. (1) All credit life insurance and credit disability insurance sold shall be evidenced by an individual policy, or in the case of group insurance by a certificate of insurance, which individual policy or group certificate of insurance shall be delivered to the debtor.

(2) Each individual policy or group certificate of credit life insurance, and credit disability insurance shall, in addition to other requirements of

law, set forth the name and home office address of the insurer, and the identity by name or otherwise of the person or persons insured, the rate or amount of payment, if any, by the debtor separately in connection with credit life insurance and credit disability insurance, a description of the coverages including any exceptions, limitations or restrictions, and shall state that the benefits shall be paid to the creditor to reduce or extinguish the unpaid indebtedness and, wherever the amount of insurance may exceed the unpaid indebtedness, that any such excess shall be payable to a beneficiary, other than the creditor, named by the debtor or to his estate.

History: En. Sec. 399, Ch. 286, L. 1959.

Collateral References

Representations and warranties in credit insurance. 97 ALR 1468.

40-4209. Delivery of policy or certificate. (1) The individual policy or group certificate of insurance shall be delivered to the insured debtor at the time the indebtedness is incurred except as hereinafter provided.

(2) If the individual policy or group certificate of insurance is not delivered to the debtor at the time the indebtedness is incurred, a copy of the application for such policy or a notice of proposed insurance, signed by the debtor and setting forth the name and home office address of the insurer, the name or names of the debtor, the amount of payment by the debtor separately in connection with credit life insurance and credit disability insurance coverage, and a brief description of the coverage provided or to be provided, shall be delivered to the debtor at the time such indebtedness is incurred. The copy of the application for, or notice of proposed insurance shall refer exclusively to insurance coverage, and shall be separate and apart from the loan, sale or other credit statement of account, instrument or agreement unless the information required by this section is prominently set forth therein. Upon approval of the application, if any, or acceptance of the insurance and within thirty (30) days of the date upon which the indebtedness is incurred, the insurer shall cause the individual policy or group certificate of insurance to be delivered to the debtor. The application or notice of proposed insurance shall state that, upon acceptance by the insurer, the insurance shall become effective as of the date the indebtedness is incurred.

History: En. Sec. 400, Ch. 286, L. 1959.

40-4210. Filing, approval and withdrawal of forms. (1) All policies, certificates of insurance, notices of proposed insurance, applications for insurance, binders, endorsements and riders shall be filed with the commission of the state in which the policy is issued.

(2) The commissioner may within thirty (30) days after the filing of all policies, certificates of insurance, notices of proposed insurance, applications for insurance, binders, endorsements and riders, in addition to other requirements of law, disapprove any such form if the table of premium rates charged or to be charged appears by reasonable assumptions to be excessive in relation to benefits or if it contains provisions which are unjust, unfair, inequitable, misleading, deceptive or encourage misrepresentation of such policy.

(3) If the commissioner notifies the insurer that the form does not comply with this section, it is unlawful thereafter for such insurer to issue or use such form. In such notice, the commissioner shall specify the reason for his disapproval and state that a hearing will be granted within twenty (20) days after request in writing by the insurer. No such policy, certificate of insurance, notice of proposed insurance, and no application, binder, endorsement or rider, shall be issued or used until the expiration of thirty (30) days after it has been so filed, unless the commissioner gives his prior written approval thereto.

The commissioner may, at any time after a hearing, of which not less than twenty (20) days written notice was given to the insurer, withdraw his approval of any such form on any of such grounds.

(5) It is not lawful for the insurer to issue such forms or use them after the effective date of such withdrawal of approval.

(6) Any order or final determination of the commissioner under the provisions of this section shall be subject to judicial review.

History: En. Sec. 401, Ch. 286, L. 1959.

Compiler's Note

There was no paragraph (4) in section 401, ch. 286, Laws 1959.

40-4211. Premiums and refunds. (1) Each insurer issuing credit life insurance or credit disability insurance shall file with the commissioner its schedules of premium rates for use in connection with such insurance. Any insurer may revise such schedules from time to time, and shall file such revised schedules with the commissioner. No insurer shall issue any credit life insurance policy or credit disability insurance policy for which the premium rate exceeds that determined by the schedules of such insurer as then on file with the commissioner. The commissioner may require the filing of the schedule of premium rates for use in connection with and as a part of the specific policy filings as provided by section 40-4210.

(2) Each individual policy, group certificate or notice of proposed insurance of credit life insurance and credit disability insurance shall provide that in the event of termination of the insurance prior to the scheduled maturity date of the indebtedness, any refund of premium due shall be paid or credited promptly to the person entitled thereto; provided, however, that the commissioner shall prescribe a minimum refund and no refund which would be less than such minimum need be made. The formula to be used in computing refunds shall be filed with the commissioner.

(3) If a creditor requires a debtor to make a payment in connection with credit life insurance or credit disability insurance and an individual policy or group certificate of insurance is not issued, the creditor shall immediately give written notice to such debtor and shall promptly make an appropriate credit to the account.

History: En. Sec. 402, Ch. 286, L. 1959.

40-4212. Issuance of policies. All policies of credit life insurance and credit disability insurance shall be delivered or issued for delivery in this state only by an insurer authorized to do an insurance business therein, and shall be issued only through holders of licenses or authorizations issued by the commissioner.

History: En. Sec. 403, Ch. 286, L. 1959.

40-4213. Claims. (1) All claims shall be promptly reported to the insurer or its designated claim representative, and the insurer shall maintain adequate claim files. All claims shall be settled as soon as possible and in accordance with the terms of the insurance contract.

(2) All claims shall be paid either by draft drawn upon the insurer or by check of the insurer to the order of the claimant to whom payment of the claim is due pursuant to the policy provisions, or upon direction of such claimant to one specified.

(3) No plan or arrangement shall be used whereby any person, firm or corporation other than the insurer or its designated claim representative shall be authorized to settle or adjust claims. The creditor shall not be designated as claim representative for the insurer in adjusting claims; except, that a group policyholder may, by arrangement with the group insurer, draw drafts or checks in payment of claims due to the group policyholder subject to audit and review by the insurer.

History: En. Sec. 404, Ch. 286, L. 1959.

40-4214. Existing insurance—choice of insurer. When credit life insurance or credit disability insurance is required as additional security for any indebtedness, the debtor shall, upon request to the creditor, have the option of furnishing the required amount of insurance through existing policies of insurance owned or controlled by him or of procuring and furnishing the required coverage through any insurer authorized to transact an insurance business within this state.

History: En. Sec. 405, Ch. 286, L. 1959.

40-4215. Enforcement. The commissioner may, after notice and hearing, issue such rules and regulations as he deems appropriate for the supervision of this chapter. Whenever the commissioner finds that there has been a violation of this chapter or any rules or regulations issued pursuant thereto, and after written notice thereof and hearing given to the insurer or other person authorized or licensed by the commissioner, he shall set forth the details of his findings together with an order for compliance by a specified date. Such order shall be binding on the insurer and other person authorized or licensed by the commissioner on the date specified unless sooner withdrawn by the commissioner or a stay thereof has been ordered by a court of competent jurisdiction.

History: En. Sec. 406, Ch. 286, L. 1959.

40-4216. Judicial review. Any party to the proceeding affected by an order of the commissioner shall be entitled to judicial review by following the procedure set forth in section 40-2725.

History: En. Sec. 407, Ch. 286, L. 1959.

40-4217. Penalties. In addition to any penalty provided by law, any person who violates an order of the commissioner after it has become final, and while such order is in effect, shall, upon proof thereof to the satisfaction of the court, forfeit and pay to the state of Montana a sum not to exceed two hundred and fifty dollars (\$250) which may be recovered in a civil action, except that if such violation is found to be willful, the amount of such penalty shall be a sum not to exceed one thousand dollars (\$1,000).

The commissioner, in his discretion, may revoke or suspend the license or certificate of authority of the person guilty of such violation. Such order for suspension or revocation shall be subject to judicial review as provided in section 40-2725.

History: En. Sec. 408, Ch. 286, L. 1959.

CHAPTER 43

PROPERTY INSURANCE CONTRACTS

Section 40-4301. Measure of the indemnity.

40-4302. Valued policy law.

40-4301. Measure of the indemnity. If there is no valuation in the policy, and unless a basis more favorable to the insured is provided for in the policy, the measure of indemnity in an insurance against fire is the expense, at the time that the loss is payable, of replacing the thing lost or injured, in the condition in which it was at the time of the injury; but a valuation, fraudulent in fact, entitles the insurer to rescind the contract.

History: En. Sec. 409, Ch. 286, L. 1959.

Collateral References

Insurance—493-503.

45 C.J.S. Insurance §§ 913-921.

29A Am. Jur. 644, Insurance, § 1538.

Overvaluation in proof of loss of property insured as fraud avoiding fire insurance policy. 20 ALR 1164.

Amount in case of partial loss of property insured under a proportional provision of statute or policy which provides in terms for full payment of amount of insurance in case of a total loss. 32 ALR 651.

Duty of insured under provision of policy requiring separation of damaged

and undamaged property and inventory of same in proofs of loss. 53 ALR 1113.

Settlement with insurance company for less than face valued policy as bar to recovery of difference where total loss is shown. 109 ALR 1485.

Recovery under fire insurance policy for damage to party wall as affected by pro rata clause. 13 ALR 2d 621.

Rent loss insurance. 17 ALR 2d 1226.

Proper procedure for appointment of umpire under appraisal clause of fire insurance policy or statute applicable thereto. 69 ALR 2d 1296.

Fluctuations in cost of making repairs between time of loss and time of payment as affecting property insurer's liability. 74 ALR 2d 1272.

DECISIONS UNDER FORMER LAW

Deterioration Deduction

Where policy contained no valuation but insurer agreed to indemnify insured by either restoring the part destroyed to the condition it was in before the fire, or paying insured a sum equal to cost of restoration, insured was entitled to judgment for the amount found by the appraisers as the cost of repairing the building, and deduction from such amount for deterioration was unwarranted, under the facts presented. *McIntosh v. Hartford Fire Insurance Co.*, 106 M 434, 440, 78 P 2d 82.

Judicial Review of Award

Courts should never interfere with an award in a fire insurance case except to prevent a manifest injustice, nor set it aside unless made without authority, or the result of fraud, mistake, or of mis-

feasance or malfeasance of the appraisers, and where questioned, courts may consider the method by which the appraisers reached their decision even though the award may be fair on its face. *McIntosh v. Hartford Fire Insurance Co.*, 106 M 434, 439, 78 P 2d 82.

Measure of Indemnity

Indemnity is the basis or foundation of fire insurance law; unless there is a valuation given in the policy, the measure of indemnity is the expense, at the time the loss is payable, of replacing the thing insured or destroyed, in the condition in which it was at the time of the fire, not in excess of the amount specified in the policy. *Lee v. Providence Washington Ins. Co.*, 82 M 264, 276, 266 P 640.

Section Read into Policy

Former section 40-904, as to measure of indemnity was as much a part of the policy

as though written into it. *McIntosh v. Hartford Fire Insurance Co.*, 106 M 434, 440, 78 P 2d 82.

40-4302. Valued policy law. Whenever any policy of insurance shall be written to insure any improvements upon real property in this state against loss by fire, tornado or lightning, and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of insurance written in such policy shall be taken conclusively to be the true value of the property insured, and the true amount of loss and measure of damages, and the payment of money as a premium for insurance shall be prima facie evidence that the party paying such insurance premium is the owner of the property insured; provided, that any insurance company may set up fraud in obtaining the policy as a defense to a suit thereon.

History: En. Sec. 410, Ch. 286, L. 1959.

insurance in case of a total loss. 32 ALR 651.

Collateral References

Insurance 493, 499, 500.

45 C.J.S. Insurance §§ 915, 916, 978, 980.

Amount in case of partial loss of property insured under a proportional provision of statute or policy which provides in terms for full payment of amount of

Settlement with insurance company for less than face of valued policy as bar to recovery of difference where total loss is shown. 109 ALR 1485.

Applicability of valued policy statute to partial fire loss. 36 ALR 2d 619.

CHAPTER 44

CASUALTY INSURANCE CONTRACTS

Section 40-4401. Waiver of defense of sovereign immunity required.

40-4401. Waiver of defense of sovereign immunity required. All contracts or policies of casualty insurance covering state-owned properties or state risks must contain therein as a part thereof an agreement on the part of the insurer waiving all right to raise the defense of sovereign immunity. No money shall be paid out of the state treasury to any person, firm or corporation, as a consideration or premium on any such policy or contract of casualty insurance unless the policy or contract contains such an agreement.

History: En. Sec. 411, Ch. 286, L. 1959.

or agency from liability for damages in tort in operating hospital as affected by liability insurance. 25 ALR 2d 227.

Collateral References

Immunity of state or governmental unit

DECISIONS UNDER FORMER LAW

Scope of Section

Former section 40-1204 was limited to state-owned property and provided for a specific policy provision waiving the right

to raise the defense of sovereign immunity. *Holland v. Western Airlines, Inc.*, 154 F Supp 457, 461.

CHAPTER 45

SURETY INSURANCE CONTRACTS

Section 40-4501. Rights of surety insurer.

40-4502. May be sole surety on official bonds.

40-4503. Release from liability on official bonds.

40-4501. Rights of surety insurer. A surety insurer authorized as such under this code shall have the power to become the surety on bonds and undertakings required by law, subject to all the rights and liabilities of private persons. This section shall not be deemed to limit in any way the powers, obligations and liabilities of such insurers as provided for in other provisions of this code.

History: En. Sec. 412, Ch. 286, L. 1959.

40-4502. May be sole surety on official bonds. Whenever any bond, undertaking, recognizance, or other obligation is by law, or the charter, ordinance, rules or regulations of any municipality, board, body, organization or public officer, required or permitted to be made, given, tendered or filed, with surety or sureties, and whenever the performance of any act, duty or obligation, or the refraining from any act, is required or permitted to be guaranteed, such bond, undertaking, obligation, recognizance or guaranty may be executed by a surety insurer qualified to act as surety or guarantor as in this code provided. Such execution by such insurer of such bond, undertaking, obligation, recognizance or guaranty shall be in all respects a full and complete compliance with every requirement of the law, charter, ordinance, rule or regulation that such bond, undertaking, obligation, recognizance or guaranty shall be executed by one surety or by one or more sureties, or that such surety shall be a resident, or householder, or freeholder, or either or both, or possessed of any other qualifications; and all courts, judges, heads of departments, boards, bodies, municipalities, and public officers of every character shall accept and treat accordingly such bond, undertaking, obligation, recognizance or guaranty when so executed by such insurer, as conforming to and fully and completely complying with every such requirement of every such law, charter, ordinance, rule or regulation.

History: En. Sec. 413, Ch. 286, L. 1959.

Cross-References

Bonds by surety companies in civil cases, sec. 93-8711.

Corporations as sureties, secs. 93-8711 to 93-8713.

Collateral References

Insurance ⇄ 36, 430; Officers ⇄ 37.
44 C.J.S. Insurance §§ 13, 249; 67 C.J.S. Officers § 39.

40-4503. Release from liability on official bonds. A surety insurer may be released from its liability on a bond referred to in section 40-4502 of this chapter upon the same terms and conditions as are by law prescribed for the release of individual sureties.

History: En. Sec. 414, Ch. 286, L. 1959.

Collateral References

Insurance ⇄ 285.
45 C.J.S. Insurance § 666.

DECISIONS UNDER FORMER LAW

Contractor's Bond

Former section 40-1704 had reference only to official bonds, but not to the bond

of a contractor for construction for a county. *National Surety Co. v. Lincoln County*, 238 Fed 705, 711.

CHAPTER 46

TITLE INSURANCE

Section 40-4601. Policy based on title evidence.

40-4602. Rates filed with commissioner.

40-4603. Guaranty fund, investments of title insurer.

40-4601. Policy based on title evidence. (1) No title insurance policy as to property in this state shall be issued by any insurer unless based upon evidence of the condition of title certified in writing as of the date of the policy by some person, firm, or corporation holding a certificate of authority issued under section 66-2111, to engage in the title abstracting business in the county in which the property is located; except, that this provision shall not apply as to title insurance policies issued upon the basis of an opinion of an attorney, duly authorized to practice law in this state, as to the condition of the title following a review by such attorney of pertinent title records or abstracts, and issued through a licensed title insurance agent who was so licensed and was regularly procuring title insurance policies issued upon such basis up to the effective date of this code.

(2) An insurer issuing any policy in violation of this section is estopped, as a matter of law, to deny the validity of the policy as to any claim or demand of the insured or assigns arising thereunder.

History: En. Sec. 415, Ch. 286, L. 1959.

Guaranty of title as insurance. 63 ALR 771.

Collateral References

Insurance Ⓒ167.

44 C.J.S. Insurance § 67.

40-4602. Rates filed with commissioner. (1) Every title insurer shall file with the commissioner a complete schedule of risk rates to be charged by it for title insurance as to property located in this state.

(2) No such rate shall be excessive, inadequate, or unreasonably discriminatory.

(3) No title insurer shall charge any rate for such insurance other than the applicable rate previously filed by it with the commissioner.

(4) Title insurers lawfully transacting business in this state on the effective date of this code shall comply with the provisions of this section within ninety (90) days thereafter.

History: En. Sec. 416, Ch. 286, L. 1959.

40-4603. Guaranty fund, investments of title insurer. A title insurer shall establish and maintain the guaranty fund required under section 40-3010, and may invest in necessary plant and equipment and in other investments as authorized under section 40-3132.

History: En. Sec. 417, Ch. 286, L. 1959.

CHAPTER 47

ORGANIZATION AND CORPORATE PROCEDURES
OF STOCK AND MUTUAL INSURERS

Section 40-4701. Scope of chapter.

40-4702. "Stock" insurer defined.

40-4703. "Mutual" insurer defined.

- 40-4704. Applicability of general corporation statutes.
- 40-4705. Incorporation.
- 40-4706. Articles of incorporation, filing and approval.
- 40-4707. Amendment of articles of incorporation.
- 40-4708. Initial qualifications—domestic mutuals.
- 40-4709. Formation of mutual insurer—bond.
- 40-4710. Applications for insurance in formation of mutual insurer.
- 40-4711. Formation of mutuals—trust deposit of premiums—issuance of policies.
- 40-4712. Formation of mutuals—failure to qualify.
- 40-4713. Additional kinds of insurance, mutuals.
- 40-4714. Membership in mutuals.
- 40-4715. Bylaws of mutual.
- 40-4716. Bylaws of stock insurer—modification.
- 40-4717. Meetings of stockholders or members.
- 40-4718. Proxies.
- 40-4719. Corrupt practices—penalty.
- 40-4720. Directors—number, election.
- 40-4721. Participation of policyholders in election of directors of stock insurer.
- 40-4722. Bond of officers of mutual.
- 40-4723. Prohibited pecuniary interest of officials.
- 40-4724. Management and exclusive agency contracts.
- 40-4725. Home office and records—penalty for unlawful removal of records.
- 40-4726. Vouchers for expenditures.
- 40-4727. Agreement not to sell property prohibited.
- 40-4728. Solicitations in other states.
- 40-4729. Contingent liability of mutual members.
- 40-4730. Levy of contingent liability.
- 40-4731. Enforcement of contingent liability.
- 40-4732. Nonassessable policies, mutual insurers.
- 40-4733. Nonassessable policies, revocation of authority.
- 40-4734. Participating policies.
- 40-4735. Dividends to stockholders.
- 40-4736. Dividends to mutual policyholders.
- 40-4737. Illegal dividends—penalty.
- 40-4738. Borrowed surplus.
- 40-4739. Impairment of capital or assets.
- 40-4740. Assessment of stockholders or members.
- 40-4741. Directors' liability for losses during deficiency.
- 40-4742. Stock transfer during impairment of capital.
- 40-4743. Mutualization of stock insurers.
- 40-4744. Converting mutual insurer.
- 40-4745. Mergers and consolidations of stock insurers.
- 40-4746. Mergers and consolidations, mutual insurers.
- 40-4747. Bulk reinsurance, stock insurers.
- 40-4748. Bulk reinsurance, mutual insurers.
- 40-4749. Mutual member's share of assets on liquidation.
- 40-4750. Extinguishment of unused corporate charters.

40-4701. Scope of chapter. This chapter shall apply only to domestic stock insurers and domestic mutual insurers transacting, or proposing to transact, insurance on the cash premium or legal reserve plan, except that sections 40-4714 (membership in mutuals) and 40-4732 (2) (nonassessable policies, mutual insurers) shall also apply to foreign and alien insurers.

History: En. Sec. 418, Ch. 286, L. 1959. 29 Am. Jur. 499, Insurance, §§ 79 et seq.

Collateral References

Insurance—32-72.

44 C.J.S. Insurance §§ 91-118.

40-4702. "Stock" insurer defined. A domestic "stock" insurer is an incorporated insurer with capital divided into shares and owned by its stockholders.

History: En. Sec. 419, Ch. 286, L. 1959.

40-4703. "Mutual" insurer defined. A domestic "mutual" insurer is an incorporated insurer without capital stock, and the governing body of which is elected by the policyholders.

History: En. Sec. 420, Ch. 286, L. 1959.

40-4704. Applicability of general corporation statutes. The applicable laws of this state as to domestic corporations formed for profit shall apply as to domestic stock insurers and domestic mutual insurers, except where in conflict with the express provisions of this code and the reasonable implications of such provisions.

History: En. Sec. 421, Ch. 286, L. 1959.

Cross-Reference

Formation of insurance companies, sec. 15-104.

40-4705. Incorporation. (1) This section applies to stock and mutual insurers hereafter incorporated in this state.

(2) Incorporators. Five (5) or more individuals, none of whom are less than twenty-one (21) years of age, may incorporate a stock insurer; ten (10) or more of such individuals may incorporate a mutual insurer. At least a majority of the incorporators shall be citizens of the United States. At least a majority of the incorporators shall be residents of this state.

(3) Articles of incorporation. The incorporators shall execute articles of incorporation in quadruplicate and acknowledge their execution thereof in the same manner as provided by law for the acknowledgment of deeds. The articles of incorporation shall state the purpose for which the corporation is formed and shall show:

(a) The name of the corporation; if a mutual, the word "mutual" must be a part of the name. An alternative name or names may be specified for use in jurisdictions wherein conflict of name with that of another insurer or organization might otherwise prevent the corporation from being authorized to transact insurance therein.

(b) The duration of its existence, which may be perpetual.

(c) The kinds of insurance, as defined in this code, which the corporation is formed to transact.

(d) If a stock corporation, its authorized capital stock, the number of shares of common stock into which divided, the par value of each such share, which par value shall be at least one dollar (\$1). Shares without par value, or other than one class of voting common stock, shall not be authorized. The articles of incorporation may limit or deny present or future stockholders pre-emptive or preferential rights to acquire additional issues of the stock, or bonds, debentures or other obligations convertible into stock, of the corporation, subject to the constitution and laws of Montana fixing the required representation and proportion of outstanding capital stock required to be represented and voted, for specified action, at any and all corporate meetings, elections, votes or consent proceedings.

(e) If a stock corporation, the extent, if any, to which shares of its stock are subject to assessment.

(f) If a stock corporation, the number of shares subscribed, if any, by each incorporator.

(g) If a mutual corporation, the maximum contingent liability of its members, other than as to nonassessable policies, for payment of losses and expenses incurred; such liability shall be stated in the articles of incorporation, but shall not be less than one (1) nor more than six (6) times the premium for the member's policy at the annual premium rate for a term of one (1) year.

(h) The minimum, not less than five (5), and the maximum, not more than twenty-one (21), number of directors who shall constitute the board of directors and conduct the affairs of the corporation; also, the names, addresses and terms of the members of the initial board of directors. The term of office of initial directors shall be for not more than one (1) year after the date of incorporation.

(i) The name of the county, and the city, town or place within the county, in which its principal office or principal place of business is to be located in this state.

(j) Such other provisions, not inconsistent with law, deemed appropriate by the incorporators.

(k) The name and residence address of each incorporator, and the citizenship of each incorporator who is not a citizen of the United States.

History: En. Sec. 422, Ch. 286, L. 1959.

Collateral References

Cross-Reference

Insurance 32, 52.

Formation of insurance companies, sec. 15-104.

44 C.J.S. Insurance §§ 95, 96, 105, 107.
29 Am. Jur. 500, 505, Insurance §§ 82, 90.

DECISIONS UNDER FORMER LAW

Law of Foreign State

Where the authority of foreign mutual fire insurance companies to write single cash premium policies under the laws of their respective states was at issue and no proof in that behalf was offered, the court was justified in holding that they had such

authority as against the contention that in the absence of proof to the contrary the presumption is that the laws of the foreign states are the same as former section 40-1431, which denied such authority to domestic mutual companies. *McMahon v. Cooney et al.*, 95 M 138, 142, 25 P 2d 131.

40-4706. Articles of incorporation, filing and approval. (1) The incorporators of a proposed domestic insurer shall deliver the quadruplicate originals of the articles of incorporation to the commissioner together with the filing fees therefor specified in section 40-2726. The commissioner shall submit the quadruplicate originals of the proposed articles of incorporation to the attorney general for examination. If the attorney general finds that the articles comply with this chapter, and are not in conflict with the constitution and laws of the United States or of this state, he shall so certify and return such certificate and all sets of the articles to the commissioner.

(2) When the articles of incorporation have been approved by the attorney general, the commissioner shall also endorse his approval upon each set of the articles; except, that if the commissioner finds that the proposed insurer would not be eligible for a certificate of authority under section 40-2810 (management and affiliations), he shall refuse to approve the articles of incorporation, and shall return them to the proposed incorporators together with a written statement of the reasons for such

refusal. If approved by him, the commissioner shall then forward the articles of incorporation with his approval endorsed thereon, together with the certificate of the attorney general, to the incorporators. The incorporators shall forthwith file one set of the articles of incorporation with the secretary of state, one set with the commissioner bearing the certification of the secretary of state, one set with the county clerk of the county wherein is to be located the corporation's principal place of business, and the remaining set of articles and the certificate of the attorney general shall be made a part of the corporation's record.

(3) If the attorney general finds that the proposed articles of incorporation do not comply with law, he shall refuse to approve the same, and shall return the quadruplicate sets thereof to the commissioner, together with a written statement of the reasons for his refusal to approve. The commissioner shall return all sets of the proposed articles of incorporation to the proposed incorporators together with the written statement of the attorney general.

(4) The corporation shall have legal existence as such upon the issuance of the certificate of incorporation by the secretary of state and the completion of the filings referred to in subsection (2) above, but it shall not transact business as an insurer until it has qualified for and received from the commissioner a certificate of authority as provided in this code.

(5) A copy of the certificate of incorporation, duly certified by the secretary of state, shall be admissible in all the courts of this state as prima facie evidence of due incorporation.

History: En. Sec. 423, Ch. 286, L. 1959.

Collateral References

Insurance Ⓒ 32.

44 C.J.S. Insurance § 95.

40-4707. Amendment of articles of incorporation. (1) A domestic stock insurer may amend its articles of incorporation for any lawful purpose by written authorization of the holders of a majority of the voting power of its outstanding capital stock or by affirmative vote of such a majority voting at a lawful meeting of stockholders of which the notice given to stockholders included due notice of the proposal to amend.

(2) A domestic mutual insurer heretofore or hereafter formed may amend its articles of incorporation for any lawful purpose by affirmative vote of a majority of those of its members present or represented by proxy at a lawful meeting of its members of which the notice given members included due notice of the proposal to amend.

(3) Upon adoption of such an amendment the insurer shall make in quadruplicate under its corporate seal a certificate (sometimes referred to as "articles of amendment") setting forth such amendment and the date and manner of the adoption thereof, which certificate shall be executed by the insurer's president or vice-president and secretary or assistant secretary and acknowledged by them before an officer authorized by law to take acknowledgments of deeds. The insurer shall deliver to the commissioner the quadruplicate originals of the certificate, together with the filing fee

specified therefor in section 40-2726. If he finds that the certificate and amendments comply with law, the commissioner shall endorse his approval upon each of the quadruplicate originals and return them to the insurer. The insurer shall forthwith file one set of such endorsed articles of amendment with the secretary of state, one set with the commissioner bearing the certification of the secretary of state, one set with the county clerk of the county in which is located the insurer's principal place of business, and retain the remaining set in the corporate records. The amendment shall be effective when such filings have been completed.

(4) If the commissioner finds that the proposed amendment or certificate does not comply with the law, he shall not approve the same, and shall return the quadruplicate certificate of amendment to the insurer together with his written statement of reasons for nonapproval. The filing fee shall not be returnable.

(5) If an amendment of articles of incorporation would reduce the authorized capital stock of a stock insurer below the amount thereof then outstanding, the commissioner shall not approve the amendment if he has reason to believe that the interests of policyholders or creditors of the insurer would be materially prejudiced by such reduction. If any such reduction of capital stock is effectuated the insurer may require return of the original certificates of stock held by each stockholder for exchange for new certificates for such number of shares as such stockholder is then entitled in the proportion that the reduced capital bears to the amount of capital stock outstanding as of immediately prior to the effective date of such reduction.

History: En. Sec. 424, Ch. 236, L. 1959.

Collateral References

Insurance 32.

44 C.J.S. Insurance § 95.

40-4708. Initial qualifications—domestic mutuals. (1) When newly organized, a domestic mutual insurer may be authorized to transact any one of the kinds of insurance listed in the schedule contained in subsection (2) of this section.

(2) When applying for an original certificate of authority, the insurer must be otherwise qualified therefor under this code, and must have received and accepted bona fide applications as to substantial insurable subjects for insurance coverage of a substantial character of the kind of insurance proposed to be transacted, must have collected in cash the full premium therefor at a rate not less than that usually charged by stock insurers for comparable coverages, must have surplus funds on hand and deposited as of the date such insurance coverages are to become effective, or, in lieu of such applications, premiums and surplus, may deposit surplus, all in accordance with that part of the following schedule which applies to the one kind of insurance the insurer proposes to transact:

INSURANCE

(a) Kind of insurance	(b) Minimum No. of applicants accepted	(c) Minimum No. of subjects covered	(d) Minimum premium collected	(e) Minimum amount of insurance each subject	(f) Maximum amount of insurance each subject (v)	(g) Minimum surplus funds deposited (vi)	(h) Deposit of surplus in lieu of (vi)
Life (i)	500	500	annual	\$1,000	\$ 2,500	\$ 50,000	\$100,000
Disability (ii)	500	500	quarterly	\$ 10 (weekly indem.)	\$ 25 (weekly indem.)	\$ 50,000	\$100,000
Property (iii)	100	250	annual	\$1,000	\$ 3,000	\$100,000	\$200,000
Casualty (iv)	250	500	annual	\$1,000	\$10,000	\$150,000	\$200,000
With workmen's compensation	250	1,500	quarterly	\$1,000	\$10,000	\$200,000	\$300,000

The following provisos are respectively applicable to the foregoing schedule and provisions as indicated by like roman numerals appearing in such schedule:

(i) No group insurance or term policies for terms of less than ten (10) years shall be included.

(ii) No group, blanket or family plans of insurance shall be included. In lieu of weekly indemnity a like premium value in medical, surgical and hospital benefits may be provided. Any accidental death or dismemberment benefit provided shall not exceed twenty-five hundred dollars (\$2,500).

(iii) Only insurance of the owner's interest in real property may be included.

(iv) Must include insurance of legal liability for bodily injury and property damage, to which the maximum and minimum insured amounts apply.

(v) The maximums provided for in this column (f) are net of applicable reinsurance.

(vi) The deposit of surplus in the amount specified in columns (g) and (h) must thereafter be maintained unimpaired. The deposit is subject to the provisions of chapter 32 of this title (administration of deposits).

History: En. Sec. 425, Ch. 286, L. 1959.

Collateral References

Insurance 52.

44 C.J.S. Insurance § 105.

29 Am. Jur. 508, Insurance, §§ 95 et seq.

40-4709. Formation of mutual insurer—bond. (1) Before soliciting any applications for insurance required under section 40-4708 as qualification for the original certificate of authority, the incorporators of the proposed insurer shall file with the commissioner a corporate surety bond in the penalty of fifteen thousand dollars (\$15,000), in favor of the state and for the use and benefit of the state and of applicant members and creditors of the corporation. The bond shall be conditioned as follows:

(a) For the prompt return to applicant members of all premiums collected in advance;

(b) For payment of all indebtedness of the corporation; and

(c) For payment of costs incurred by the state in event of any legal proceedings for liquidation or dissolution of the corporation, all in the event the corporation fails to complete its organization and secure a certificate of authority within one year from after the date of its certificate of incorporation.

(2) In lieu of such bond, the incorporators may deposit with the commissioner fifteen thousand dollars (\$15,000) in cash or United States government bonds, negotiable and payable to the bearer, with a market value at all times of not less than fifteen thousand dollars (\$15,000), to be held in trust upon the same conditions as required for the bond.

(3) Any such bond filed or deposit or remaining portion thereof held under this section shall be released and discharged upon settlement and termination of all liabilities against it.

History: En. Sec. 426, Ch. 286, L. 1959.

40-4710. Applications for insurance in formation of mutual insurer.

(1) Upon receipt of the commissioner's approval of the bond or deposit as provided in section 40-4709, the directors and officers of the proposed domestic mutual insurer may commence solicitation of such requisite applications for insurance policies as they may accept, and may receive deposits of premiums thereon.

(2) All such applications shall be in writing signed by the applicant, covering subjects of insurance resident, located or to be performed in this state.

(3) All such applications shall provide that:

(a) Issuance of the policy is contingent upon the insurer qualifying for and receiving a certificate of authority;

(b) No insurance is in effect unless and until the certificate of authority has been issued; and

(c) The prepaid premium or deposit, and membership or policy fee, if any, shall be refunded in full to the applicant if organization is not completed and the certificate of authority is not issued and received by the insurer before a specified reasonable date which date shall be not later than one year after the date of the certificate of incorporation.

(4) All qualifying premiums collected shall be in cash.

(5) Solicitation for such qualifying applicants for insurance shall be by licensed agents of the corporation, and the commissioner shall, upon the corporation's application therefor, issue temporary agent's licenses expiring on the date specified pursuant to subdivision (c) above to individuals qualified as for a resident agent's license except as to the taking or passing of an examination. The commissioner may suspend or revoke any such license for any of the causes and pursuant to the same procedures as are applicable to suspension or revocation of licenses of agents in general under chapter 33 of this title.

History: En. Sec. 427, Ch. 286, L. 1959.

40-4711. Formation of mutuals—trust deposit of premiums—issuance of policies. (1) All sums collected by a domestic mutual corporation as premiums or fees on qualifying applications for insurance therein shall be deposited in trust in a bank or trust company in this state under a written trust agreement consistent with this section and with section 40-4710 (3) (c). The corporation shall file an executed copy of such trust agreement with the commissioner.

(2) Upon issuance to the corporation of a certificate of authority as an insurer for the kind of insurance for which such applications were solicited, all funds so held in trust shall become the funds of the insurer, and the insurer, shall thereafter in due course issue and deliver its policies for which premiums had been paid and accepted. The insurance provided by such policies shall be effective as of the date of the certificate of authority or thereafter as provided by the respective policies.

History: En. Sec. 428, Ch. 286, L. 1959.

40-4712. Formation of mutuals—failure to qualify. If the proposed domestic insurer fails to complete its organization and to secure its original certificate of authority within one year from and after date of its certi-

cate of incorporation, its corporate powers shall cease, and the commissioner shall return or cause to be returned to the persons entitled thereto all advance deposits or payments of premiums held in trust under section 40-4711.

History: En. Sec. 429, Ch. 286, L. 1959.

40-4713. Additional kinds of insurance, mutuals. A domestic mutual insurer, after being authorized to transact one kind of insurance, may be authorized by the commissioner to transact such additional kinds of insurance as are permitted under section 40-2806, while otherwise in compliance with this code and while maintaining unimpaired surplus funds in an amount not less than the amount of paid-in capital stock required of a domestic stock insurer transacting like kinds of insurance, subject further to the additional expendable surplus requirements of section 40-2808 applicable to such a stock insurer.

History: En. Sec. 430, Ch. 286, L. 1959.

40-4714. Membership in mutuals. (1) Each policyholder of a domestic mutual insurer, other than of a reinsurance contract, is a member of the insurer with all rights and obligations of such membership, and the policy shall so specify.

(2) Any person, government or governmental agency, state or political subdivision thereof, public or private corporation, board, association, firm, estate, trustee or fiduciary may be a member of a domestic, foreign, or alien mutual insurer. Any officer, stockholder, trustee or legal representative of any such corporation, board, association or estate may be recognized as acting for or on its behalf for the purpose of such membership, and shall not be personally liable upon any contract of insurance for acting in such representative capacity.

(3) Any domestic corporation may participate as a member of a mutual insurer as an incidental purpose for which such corporation is organized, and as much granted as the rights and powers expressly conferred.

History: En. Sec. 431, Ch. 286, L. 1959.

DECISIONS UNDER FORMER LAW

Ambiguities in Policy

The rule that any ambiguity in the policy shall be resolved against the insurer since the latter is responsible for the form of the contract, is applicable to contracts

between mutual death benefit societies and their members. *McDonald v. Northern Benefit Association*, 113 M 595, 605, 131 P 2d 479.

40-4715. Bylaws of mutual. (1) A domestic mutual insurer shall have bylaws for the governing of its affairs. The initial board of directors of the insurer shall adopt original bylaws, subject to the approval of the insurer's members at the next succeeding meeting. The members shall have power to make, modify and revoke bylaws.

(2) The bylaws shall provide:

(a) That each member is entitled to one vote upon each matter coming to a vote at meetings of members; or to more votes in accordance with a reasonable classification of members as set forth in the bylaws and based

upon the amount of insurance in force, number of policies held or upon the amount of the premiums paid by such member, or upon other reasonable factors. A member shall have the right to vote in person or by his written proxy. No such proxy shall be made irrevocable or for longer than a reasonable period of time;

(b) For election of directors by the members, and the number, qualifications, terms of office and powers of directors;

(c) The time, notice, quorum, and conduct of annual and special meetings of members and voting thereat. The bylaws may provide that the annual meeting shall be held at a place, date and time to be set forth in the policy and without giving other notice of such meeting;

(d) The number, designation, election, terms and powers and duties of the respective corporate officers;

(e) For deposit, custody, disbursement and accounting as to corporate funds;

(f) For any other reasonable provisions customary, necessary or convenient for the management or regulation of its corporate affairs.

(3) No provision in the bylaws for determining a quorum of members at any meeting thereof of less than a majority of all the insurer's members shall be effective unless approved by the commissioner. This subsection shall not affect any other provision of law requiring vote of a larger percentage of members for a specified purpose.

(4) The insurer shall promptly file with the commissioner a copy, certified by the insurer's secretary, of its bylaws and of every modification thereof or addition thereto. The commissioner shall disapprove any bylaw provision deemed by him to be unlawful, unreasonable, inadequate, unfair or detrimental to the proper interests or protection of the insurer's members or any class thereof. The insurer shall not, after receiving written notice of such disapproval and during the existence thereof, effectuate any bylaw provision so disapproved.

History: En. Sec. 432, Ch. 286, L. 1959.

Collateral References.

Insurance 54.

44 C.J.S. Insurance § 107.

40-4716. Bylaws of stock insurer—modification. Any bylaw so adopted at any meeting of stockholders of a domestic insurer shall not be modified or revoked except by the stockholders at a subsequent meeting unless the bylaws as adopted or amended by the stockholders grants authority to the board of directors to revoke or modify bylaw provisions; but the board of directors shall not so revoke or modify any bylaw relating to the qualifications, election, terms, or compensation of directors, or to the calling or notice of meetings of stockholders. Any revocation or modification of bylaws made by the directors under this provision shall be presented at the next following meeting of stockholders for the information of the stockholders.

History: En. Sec. 433, Ch. 286, L. 1959.

Collateral References

Insurance 32.

44 C.J.S. Insurance § 107.

40-4717. Meetings of stockholders or members. (1) Meetings of stockholders or members of a domestic insurer shall be held in the city or town of its principal office or place of business in this state.

(2) No meeting of stockholders or members shall amend the insurer's articles of incorporation unless the proposal so to amend was included in the notice of the meeting.

(3) Each insurer shall, during the first six (6) months of each calendar year, hold the annual meeting of its stockholders or members, to fill vacancies existing or occurring in the board of directors, receive and consider reports of the insurer's officers as to its affairs, and transact such other business as may properly be brought before it. Not less than twenty (20) days' notice shall be given of such meeting in the manner provided in the bylaws, except where notice of the annual meeting of a mutual insurer is contained in its policies.

(4) Special meetings of the stockholders or members may be called at any time for any purpose by the board of directors, upon not less than ten days' notice as provided in the bylaws. The notice shall state the purpose of the meeting, and no business shall be transacted at the meeting of which notice was not so given.

(5) If more than fifteen (15) months are allowed to elapse without an annual stockholders' or members' meeting being held, any stockholder or member may call such a meeting to be held. At any time, upon written request of any director, or of any stockholders or members holding in the aggregate one-fifth of the voting power of all stockholders or members, it shall be the duty of the secretary to call a special meeting of stockholders or members to be held at such time as the secretary may fix, not less than ten (10) nor more than thirty (30) days after the receipt of the request. If the secretary fails to issue such call, the director, stockholders or members making the request may do so.

(6) A stockholders' or members' meeting duly held can be organized for the transaction of business whenever a quorum is present. Except as otherwise provided by law or the articles of incorporation:

(a) The presence, in person or by proxy, of the holders of a majority of the voting power of all stockholders or of all members shall constitute a quorum;

(b) The stockholders or members present at a duly organized meeting can continue to do business until adjournment, notwithstanding the withdrawal of enough stockholders or members to leave less than a quorum;

(c) If any necessary officer fails to attend such meeting, any stockholder or member present may be elected to act temporarily in lieu of any such absent officer;

(d) If a meeting cannot be organized because a quorum has not attended, those present may adjourn the meeting to such time as they may determine, but in the case of any meeting called for the election of any director the adjournment must be to the next day and those who attend the second of such adjourned meetings, although less than a quorum as fixed in this section or in the articles of incorporation, shall nevertheless constitute a quorum for the purpose of electing any director; and

(e) An annual or special meeting of stockholders or members may be adjourned to another date without new notice being given.

History: En. Sec. 434, Ch. 286, L. 1959.

40-4718. Proxies. (1) Every proxy of a stockholder of an insurer, unless coupled with an interest, shall be revocable at will and this provision cannot be waived. The validity of every unrevoked proxy shall cease eleven (11) months after the date of its execution unless some other definite period of validity is expressly provided therein, but in no event shall a proxy, unless coupled with an interest, be voted on after three (3) years from the date of its execution.

(2) The revocation of a proxy shall not be effective until notice thereof has been given to the secretary of the insurer.

History: En. Sec. 435, Ch. 286, L. 1959.

40-4719. Corrupt practices—penalty. No person shall buy or sell or barter a vote or proxy, relative to any meeting of stockholders or members of an insurer, or engage in any corrupt or dishonest practice in or relative to the conduct of any such meeting. Violation of this section shall be punishable as provided in section 40-2617.

History: En. Sec. 436, Ch. 286, L. 1959.

40-4720. Directors—number, election. (1) The affairs of every domestic insurer shall be managed by the number of directors fixed in the insurer's bylaws, which shall not be less than five (5) nor more than twenty-one (21) directors.

(2) Directors must be elected from and by the members or stockholders of a domestic insurer, except as provided in section 40-4721 of this chapter, at such time and place, and for such terms, not exceeding three (3) years, as may be provided in the insurer's bylaws.

(3) The term of a director shall extend until his successor has been elected and has qualified.

History: En. Sec. 437, Ch. 286, L. 1959.

Collateral References

Insurance Ⓒ 35, 56.

44 C.J.S. Insurance §§ 98, 109.

40-4721. Participation of policyholders in election of directors of stock insurer. The bylaws of a domestic stock life insurer may provide a plan for its policyholders to participate with stockholders in the election of its directors.

History: En. Sec. 438, Ch. 286, L. 1959.

Collateral References

Insurance Ⓒ 35.

44 C.J.S. Insurance § 98.

40-4722. Bond of officers of mutual. (1) The president, secretary and treasurer of every mutual insurer shall each file with the commissioner and thereafter maintain in force so long as he is such an officer, a fidelity bond in the sum of ten thousand dollars (\$10,000) issued by an authorized corporate surety in favor of the insurer. In lieu of individual bonds, all such officers may be covered under a blanket bond for the same

respective amounts, and which blanket bond shall likewise be filed with the commissioner.

(2) The premium for the bond shall be payable by the insurer.

(3) No such bond shall be subject to cancellation except upon written notice to both the insurer and the commissioner, delivered not less than thirty (30) days in advance of the effective date of such cancellation.

(4) The insurer shall provide for the bonding by authorized corporate surety of all other officers in any way responsible for the handling of the funds of the insurer.

(5) This section shall not be deemed to limit the amount of bonded protection which the insurer may carry as to any officer.

History: En. Sec. 439, Ch. 286, L. 1959. **Collateral References**
Insurance 56.
44 C.J.S. Insurance § 109.

40-4723. Prohibited pecuniary interest of officials. (1) Any officer or director, or any member of any committee or an employee of a domestic insurer who is charged with the duty of investing or handling the insurer's funds shall not deposit or invest such funds except in the insurer's corporate name; shall not borrow the funds of such insurer; shall not be pecuniarily interested in any loan, pledge of deposit, security, investment, sale, purchase, exchange, reinsurance, or other similar transaction or property of such insurer except as a stockholder or member; shall not take or receive to his own use any fee, brokerage, commission, gift, or other consideration for or on account of any such transaction made by or on behalf of such insurer.

(2) No insurer shall guarantee any financial obligation of any of its officers or directors.

(3) This section shall not prohibit such a director or officer, or member of a committee or employee from becoming a policyholder of the insurer and enjoying the usual rights so provided for its policyholders.

(4) The commissioner may, by regulations from time to time, define and permit additional exceptions to the prohibition contained in subsection (1) of this section solely to enable payment of reasonable compensation to a director who is not otherwise an officer or employee of the insurer, or to a corporation or firm in which a director is interested, for necessary services performed or sales or purchases made to or for the insurer in the ordinary course of the insurer's business and in the usual private professional or business capacity of such director or such corporation or firm.

History: En. Sec. 440, Ch. 286, L. 1959.

40-4724. Management and exclusive agency contracts. (1) No domestic insurer shall make any contract whereby any person is granted or is to enjoy in fact the management of the insurer to the substantial exclusion of its board of directors, or to have the controlling or pre-emptive right to produce substantially all insurance business for the insurer, unless the contract is filed with and approved by the commissioner. The contract shall be deemed approved unless disapproved by the commissioner within twenty (20) days after date of filing, subject to such reasonable extension

of time as the commissioner may require by notice given within such twenty (20) days. Any disapproval shall be delivered to the insurer in writing, stating the grounds therefor.

(2) The commissioner shall disapprove any such contract if he finds that it:

- (a) Subjects the insurer to excessive charges; or
- (b) Is to extend for an unreasonable length of time; or
- (c) Does not contain fair and adequate standards of performance; or
- (d) Contains other inequitable provision or provisions which impair the proper interests of stockholders or members of the insurer.

History: En. Sec. 441, Ch. 286, L. 1959.

40-4725. Home office and records—penalty for unlawful removal of records. (1) Every domestic insurer shall have and maintain its principal place of business and home office in this state, and shall keep therein complete records of its assets, transactions, and affairs in accordance with such methods and systems as are customary or suitable as to the kind or kinds of insurance transacted.

(2) Every domestic insurer shall have and maintain its assets in this state, except as to:

(a) Real property and personal property appurtenant thereto lawfully owned by the insurer and located outside this state, and

(b) Such property of the insurer as may be customary, necessary, and convenient to enable and facilitate the operation of its branch offices and "regional home offices" located outside this state as referred to in subsection (4) below.

(3) Removal of all or a material part of the records or assets of a domestic insurer from this state except pursuant to a plan of merger or consolidation approved by the commissioner under this code, or for such reasonable purposes and periods of time as may be approved by the commissioner in writing in advance of such removal, or concealment of such records or assets or material part thereof from the commissioner, is prohibited. Any person who removes or attempts to remove such records or assets or such material part thereof from the home office or other place of business or of safekeeping of the insurer in this state with the intent to remove the same from this state, or who conceals or attempts to conceal the same from the commissioner, in violation of this subsection, shall upon conviction thereof be guilty of a felony, punishable by a fine of not more than ten thousand dollars (\$10,000) or by imprisonment in the penitentiary for not more than five (5) years, or by both such fine and imprisonment in the discretion of the court. Upon any removal or attempted removal of such records or assets or upon retention of such records or assets or material part thereof outside this state, beyond the period therefor specified in the commissioner's consent under which the records were so removed thereat, or upon concealment of or attempt to conceal records or assets in violation of this section, the commissioner may institute delinquency proceedings against the insurer pursuant to the provisions of chapter 51 of this title.

(4) This section shall not be deemed to prohibit or prevent an insurer from:

(a) Establishing and maintaining branch offices or "regional home offices" in other states where necessary or convenient to the transaction of its business and keeping therein the detailed records and assets customary and necessary for the servicing of its insurance in force and affairs in the territory served by such an office, as long as such records and assets are made readily available at such office for examination by the commissioner at his request.

(b) Having, depositing or transmitting funds and assets of the insurer in or to jurisdictions outside of this state as reasonably and customarily required in the regular course of its business.

(c) Making deposits under custodial arrangements as provided by section 40-3204 (3).

History: En. Sec. 442, Ch. 286, L. 1959.

40-4726. Vouchers for expenditures. (1) No insurer shall make any disbursement of one hundred dollars (\$100) or more, unless evidenced by a voucher correctly describing the consideration for the payment and supported by a check or receipt endorsed or signed by or on behalf of the person receiving the money.

(2) If the disbursement is for services and reimbursement, the voucher shall describe the services and expenditures.

(3) If the disbursement is in connection with any matter pending before any legislature or public body or before any public official, the voucher shall also correctly describe the nature of the matter and of the insurer's interest therein.

(4) If a voucher cannot be obtained, the expenditure referred to in subsection (1) above shall be evidenced by an affidavit in which is set forth the character and object of the expenditure and the reasons for not obtaining a voucher therefor.

History: En. Sec. 443, Ch. 286, L. 1959.

40-4727. Agreement not to sell property prohibited. No insurer shall enter into any agreement to withhold from sale any of its property. Disposition of an insurer's property shall be at all times within the control of its board of directors.

History: En. Sec. 444, Ch. 286, L. 1959.

40-4728. Solicitations in other states. (1) No domestic insurer shall knowingly solicit insurance business in any reciprocating state in which it is not then licensed as an authorized insurer.

(2) This section shall not prohibit advertising through publication and radio, television and other broadcasts originating outside such reciprocating state, if the insurer is licensed in a majority of the states in which such advertising is disseminated, and if such advertising is not specifically directed to residents of such reciprocating state.

(3) This section shall not prohibit insurance, covering persons or risks located in a reciprocating state, under contracts solicited and issued

in states in which the insurer is then licensed. Nor shall it prohibit insurance effectuated by the insurer as an unauthorized insurer in accordance with the laws of the reciprocating state.

(4) A "reciprocating" state, as used herein, is one under the laws of which a similar prohibition is imposed upon and enforced against insurers domiciled in that state.

(5) The commissioner shall suspend or revoke the certificate of authority of a domestic insurer found by him, after a hearing, to have violated this section.

History: En. Sec. 445, Ch. 286, L. 1959.

40-4729. Contingent liability of mutual members. (1) Each member of a domestic mutual insurer shall, except as otherwise hereinafter provided with respect to nonassessable policies, have a contingent liability, pro rata and not one for another, for the discharge of its obligations, which contingent liability shall be expressed in the policy and be in such maximum amount as is specified in the insurer's articles of incorporation.

(2) Termination of the policy of any such member shall not relieve the member of contingent liability for his proportion, if any, of the obligations of the insurer which accrued while the policy was in force.

(3) Unrealized contingent liability of members does not constitute an asset of the insurer in any determination of its financial condition.

History: En. Sec. 446, Ch. 286, L. 1959.

Collateral References

Insurance—190-198.

44 C.J.S. Insurance §§ 367-404.

Liability of member of mutual fire insurance company as affected by period of membership. 53 ALR 343.

Liability of policyholders in mutual insurance companies to assessments. 137 ALR 945.

40-4730. Levy of contingent liability. (1) If at any time the assets of a domestic mutual insurer are less than its liabilities and the minimum amount of surplus required to be maintained by it by this code for authority to transact the kinds of insurance being transacted, and the deficiency is not cured from other sources, its directors shall levy an assessment only upon its members who held policies providing for contingent liability at any time within the twelve (12) months preceding the date notice of such assessment was mailed to them, and such members shall be liable to the insurer for the amount so assessed.

(2) The assessment shall be for such an amount as is required to cure such deficiency and to provide a reasonable amount of working funds above such minimum amount of surplus, but such working funds so provided shall not exceed five per cent (5%) of the insurer's liabilities as of the date as of which the amount of such deficiency was determined.

(3) In levying an assessment upon a policy providing for contingent liability, the assessment shall be computed on the basis of the premiums earned on such policy during the period to which the assessment relates.

(4) No member shall have an offset against any assessment for which he is liable, on account of any claim for unearned premium or loss payable.

(5) As to life insurance, any part of such an assessment upon a member which remains unpaid following notice of assessment, demand for payment,

and lapse of a reasonable waiting period as specified in such notice, may, if approved by the commissioner as being in the best interests of the insurer and its members, be secured by placing a lien upon the cash surrender values and accumulated dividends held by the insurer to the credit of such member.

History: En. Sec. 447, Ch. 286, L. 1959.

Right to set off loss under mutual insurance policy against premium or assessment. 31 ALR 1281.

Collateral References

Insurance ◊ 195.

44 C.J.S. Insurance §§ 367-404.

40-4731. Enforcement of contingent liability. (1) Any assessment made by an insurer under section 40-4730 or 40-4740 of this chapter shall be deemed to be prima facie correct. The amount of such assessment to be paid by each member as determined by the insurer shall be deemed to be likewise prima facie correct.

(2) The insurer shall notify each member of the amount of the assessment to be paid by written notice mailed to the address of the member last of record with the insurer. Failure of the member to receive the notice so mailed, within the time specified therein for the payment of the assessment or at all, shall be no defense in any action to collect the assessment.

(3) If a member fails to pay the assessment within the period specified in the notice, which period shall not be less than twenty (20) days after mailing, the insurer may institute suit to collect the same.

History: En. Sec. 448, Ch. 286, L. 1959.

40-4732. Nonassessable policies, mutual insurers. (1) While possessing surplus funds in amount not less than the paid-in capital stock required of a domestic stock insurer transacting like kinds of insurance, a domestic mutual insurer may, upon receipt of the commissioner's order so authorizing, extinguish the contingent liability of its members as to all its policies in force and may omit provisions imposing contingent liability in all its policies currently issued.

(2) A foreign or alien mutual insurer may issue nonassessable policies to its members in this state pursuant to its articles of incorporation and the laws of its domicile.

(3) No policy of a domestic mutual insurer which, pursuant to the commissioner's order, is without contingent liability and thereby nonassessable by its terms shall be subject to assessment for any debt or liability of the insurer.

History: En. Sec. 449, Ch. 286, L. 1959.

40-4733. Nonassessable policies, revocation of authority. The commissioner shall revoke the authority of a domestic mutual insurer to issue policies without contingent liability if at any time the insurer's assets are less than the sum of its liabilities and the surplus required for such authority, or if the insurer, by resolution of its board of directors approved by a majority of its members, requests that the authority be revoked. During the absence of such authority the insurer shall not issue any policy without providing therein for the contingent liability of the policyholder, nor

renew any policy which is renewable at the option of the insurer without endorsing the same to provide for such contingent liability.

History: En. Sec. 450, Ch. 286, L. 1959.

40-4734. Participating policies. (1) If provided in its articles of incorporation, a domestic stock or domestic mutual insurer may issue any or all of its policies with or without participation in profits, savings or unabsorbed portions of premiums, may classify policies issued on a participating and nonparticipating basis, and may determine the right to participate and the extent of participation of any class or classes of policies. Any such classification or determination shall be reasonable, and shall not unfairly discriminate as between policyholders within the same such classifications. A life insurer may issue both participating and nonparticipating policies only if the right or absence of right to participate is reasonably related to the premium charged. Any such domestic insurer which, prior to the effective date of this code, has been issuing all or part of its policies on a participating basis without specific authorization in its articles of incorporation, may continue to issue such policies on a basis not inconsistent with this section.

(2) After the third policy year no dividend otherwise earned, shall be made contingent upon the payment of renewal premium on any policy.

History: En. Sec. 451, Ch. 286, L. 1959.

Collateral References

Insurance—36, 57(1).

44 C.J.S. Insurance §§ 99, 110.

DECISIONS UNDER FORMER LAW

Foreign Corporations

Where the authority of foreign mutual fire insurance companies to write single cash premium policies under the laws of their respective states was at issue and no proof in that behalf was offered, the court was justified in holding that they had such

authority as against the contention that in the absence of proof to the contrary the presumption is that the laws of the foreign states are the same as former section 40-1431, which denied such authority to domestic mutual companies. *McMahon v. Cooney et al.*, 95 M 138, 142, 25 P 2d 131.

40-4735. Dividends to stockholders. (1) A domestic stock insurer shall not pay any cash dividend to stockholders except out of that part of its available surplus funds which is derived from realized net profits on its business.

(2) A stock dividend may be paid out of any available surplus funds in excess of the aggregate amount of surplus loaned to the insurer under section 40-4738.

(3) A dividend otherwise proper may be payable out of the insurer's earned surplus even though its total surplus is then less than the aggregate of its past contributed surplus resulting from issuance of its capital stock at a price in excess of the par value thereof.

History: En. Sec. 452, Ch. 286, L. 1959.

Collateral References

Insurance—38.

44 C.J.S. Insurance § 103.

29 Am. Jur. 519, Insurance, §§ 110-113.

40-4736. Dividends to mutual policyholders. (1) The directors of a domestic mutual insurer may from time to time apportion and pay or credit

to its members dividends only out of that part of its surplus funds which represents net realized savings and net realized earnings in excess of the surplus required by law to be maintained.

(2) A dividend otherwise proper may be payable out of such savings and earnings even though the insurer's total surplus is then less than the aggregate of its contributed surplus.

History: En. Sec. 453, Ch. 286, L. 1959.

Apportionment of divisible surplus between different policies. 108 ALR 1212.

Collateral References

Illustrations concerning accumulation, surplus, etc. 127 ALR 1464.

Insurance—59.

44 C.J.S. Insurance § 114.

40-4737. Illegal dividends—penalty. (1) Any director of a domestic stock or mutual insurer who votes for or concurs in declaration or payment of a dividend to stockholders or members other than as authorized under sections 40-4735 or 40-4736 shall upon conviction thereof be guilty of a misdemeanor and shall be jointly and severally liable, together with other such directors likewise voting for or concurring, for any loss thereby sustained by the insurer.

(2) Any stockholder receiving such an illegal dividend shall be liable in the amount thereof to the insurer.

(3) The commissioner may revoke or suspend the certificate of authority of an insurer which has declared or paid such an illegal dividend.

History: En. Sec. 454, Ch. 286, L. 1959.

40-4738. Borrowed surplus. (1) A domestic stock or mutual insurer may borrow money to defray the expenses of its organization, provide it with surplus funds, or for any purpose of its business, upon a written agreement that such money is required to be repaid only out of the insurer's surplus in excess of that stipulated in such agreement. The agreement may provide for interest not exceeding six per cent (6%) per annum, which interest shall or shall not constitute a liability of the insurer as to its funds other than such excess of surplus, as stipulated in the agreement. No commission or promotion expense shall be paid in connection with any such loan.

(2) Money so borrowed, together with the interest thereon if so stipulated in the agreement, shall not form a part of the insurer's legal liabilities except as to its surplus in excess of the amount thereof stipulated in the agreement, or be the basis of any setoff; but until repaid, financial statements filed or published by the insurer shall show as a footnote thereto the amount thereof then unpaid together with any interest thereon accrued but unpaid.

(3) Any such loan to a mutual insurer shall be subject to the commissioner's approval. The insurer shall, in advance of the loan, file with the commissioner a statement of the purpose of the loan and a copy of the proposed loan agreement. The loan and agreement shall be deemed approved unless within fifteen days after date of such filing the insurer is notified of the commissioner's disapproval and the reasons therefor. The commissioner shall disapprove any proposed loan or agreement if he finds the loan is unnecessary or excessive for the purpose intended, or that the

terms of the loan agreement are not fair and equitable to the parties, and to other similar lenders, if any, to the insurer, or that the information so filed by the insurer is inadequate.

(4) Any such loan to a mutual insurer or substantial portion thereof shall be repaid by the insurer when no longer reasonably necessary for the purpose originally intended. No repayment of such loan shall be made by a mutual insurer unless in advance approved by the commissioner.

(5) This section shall not apply to loans obtained by the insurer in ordinary course of business from banks and other financial institutions, nor to loans secured by pledge or mortgage of assets.

History: En. Sec. 455, Ch. 286, L. 1959.

40-4739. Impairment of capital or assets. (1) If a stock insurer's capital (as represented by the aggregate par value of its outstanding capital stock) becomes impaired, or the assets of a mutual insurer are less than its liabilities and the minimum amount of surplus required to be maintained by it under sections 40-4708 or 40-4713 for authority to transact the kinds of insurance being transacted, the commissioner shall at once determine the amount of deficiency and serve notice upon the insurer to make good the deficiency within sixty days after service of such notice.

(2) The deficiency may be made good in cash or in assets eligible under chapter 31 (investments) for the investment of the insurer's funds; or if a stock insurer, by reduction of the insurer's capital to an amount not below the minimum required for the kinds of insurance thereafter to be transacted; or if a mutual insurer, by amendment of its certificate of authority to cover only such kind or kinds of insurance thereafter for which the insurer has sufficient surplus under this code.

(3) If the deficiency is not made good and proof thereof filed with the commissioner within such sixty-day period, the insurer shall be deemed insolvent and the commissioner shall institute delinquency proceedings against it under chapter 51 of this title; except that if such deficiency exists because of increased loss reserves required by the commissioner, or because of disallowance by the commissioner of certain assets or reduction of the value at which carried in the insurer's accounts, the commissioner may, in his discretion and upon application and good cause shown, extend for not more than an additional sixty days the period within which such deficiency may be so made good and such proof thereof so filed.

History: En. Sec. 456, Ch. 286, L. 1959.

Collateral References

Insurance—33, 55.

44 C.J.S. Insurance §§ 97, 108.

40-4740. Assessment of stockholders or members. Any insurer receiving the commissioner's notice mentioned in section 40-4739 (1):

(1) If a stock insurer, by resolution of its board of directors and subject to any limitations upon assessment contained in its articles of incorporation, may assess its stockholders for amounts necessary to cure the deficiency and provide the insurer with a reasonable amount of surplus in addition. If any stockholder fails to pay a lawful assessment after notice given to him in person or by advertisement in such time and manner as

approved by the commissioner, the insurer may require the return of the original certificate of stock held by the stockholder, and in cancellation and in lieu thereof issue a new certificate for such number of shares as the stockholder may then be entitled to, upon the basis of the stockholder's proportionate interest in the amount of the insurer's capital stock as determined by the commissioner to be remaining at the time of determination of amount of impairment under section 40-4739, after deducting from such proportionate interest the amount of such unpaid assessment. The insurer may pay for or reissue fractional shares under this subsection.

(2) If a mutual insurer, shall levy such an assessment upon members as is provided for under section 40-4730.

(3) Neither this section nor section 40-4739 shall be deemed to prohibit the insurer from curing any such deficiency through any lawful means other than those referred to in such sections.

History: En. Sec. 457, Ch. 286, L. 1959.

40-4741. Directors' liability for losses during deficiency. The directors of the insurer shall be individually liable as to losses incurred under policies issued by the insurer after expiration of the period provided in section 40-4739 for curing any deficiency of the insurer's capital stock or surplus and prior to the curing of the deficiency.

History: En. Sec. 458, Ch. 286, L. 1959.

40-4742. Stock transfer during impairment of capital. Any transfer of the stock of a domestic insurer made during the existence of any impairment of such insurer's capital does not release the stockholder making the transfer from any liability as a stockholder of such insurer which accrued prior to such transfer.

History: En. Sec. 459, Ch. 286, L. 1959.

40-4743. Mutualization of stock insurers. (1) A stock insurer other than a title insurer may become a mutual insurer under such plan and procedure as may be approved by the commissioner after a hearing thereon.

(2) The commissioner shall not approve any such plan, procedure or mutualization unless:

(a) It is equitable to stockholders and policyholders;

(b) It is subject to approval by the holders of not less than three-fourths of the insurer's outstanding capital stock having voting rights and by not less than two-thirds of the insurer's policyholders who vote on such plan in person, by proxy or by mail pursuant to such notice and procedure as may be approved by the commissioner;

(c) If a life insurer, the right to vote thereon is limited to holders of policies other than term or group policies, and whose policies have been in force for more than one year;

(d) Mutualization will result in retirement of shares of the insurer's capital stock at a price not in excess of the fair market value thereof as determined by competent disinterested appraisers;

(e) The plan provides for the purchase of the shares of any non-consenting stockholder in the same manner and subject to the same ap-

plicable conditions as provided by section 15-1905 Replacement Vol. 2, Revised Codes of Montana, 1947, as to rights of nonconsenting stockholders, with respect to consolidation or merger of private corporations;

(f) The plan provides for definite conditions to be fulfilled by a designated early date upon which such mutualization will be deemed effective; and

(g) The mutualization leaves the insurer with surplus funds reasonably adequate for the security of its policyholders and to enable it to continue successfully in business in the state in which it is then authorized to transact insurance, and for the kinds of insurance included in its certificates of authority in such states.

(3) This section shall not apply to mutualization under order of court pursuant to rehabilitation or reorganization of an insurer under chapter 51.

History: En. Sec. 460, Ch. 286, L. 1959.

40-4744. Converting mutual insurer. (1) A mutual insurer may become a stock insurer under such plan and procedure as may be approved by the commissioner after a hearing thereon.

(2) The commissioner shall not approve any such plan or procedure unless:

(a) It is equitable to the insurer's members;

(b) It is subject to approval by vote of not less than three-fourths of the insurer's current members voting thereon in person, by proxy, or by mail at a meeting of members called for the purpose pursuant to such reasonable notice and procedure as may be approved by the commissioner; if a life insurer, right to vote may be limited to members who hold policies other than term or group policies, and whose policies have been in force for not less than one year;

(c) The equity of each policyholder in the insurer is determinable under a fair formula approved by the commissioner, which such equity shall be based upon not less than the insurer's entire surplus (after deducting contributed or borrowed surplus funds) plus a reasonable present equity in its reserves and in all nonadmitted assets;

(d) The policyholders entitled to participate in the purchase of stock or distribution of assets shall include all current policyholders and all existing persons who had been a policyholder of the insurer within three years prior to the date such plan was submitted to the commissioner;

(e) The plan gives to each policyholder of the insurer as specified in subdivision (d) above, a pre-emptive right to acquire his proportionate part of all of the proposed capital stock of the insurer, within a designated reasonable period, and to apply upon the purchase thereof the amount of his equity in the insurer as determined under subdivision (c) above;

(g) Shares are so offered to policyholders at a price not greater than to be thereafter offered to others, but at not more than double the par value of such shares;

(h) The plan provides for payment to each policyholder not electing to apply his equity in the insurer for or upon the purchase price of stock to which pre-emptively entitled, of cash in the amount of not less than fifty per cent (50%) of the amount of his equity not so used for the purchase

of stock, and which cash payment together with stock so purchased, if any, shall constitute full payment and discharge of the policyholder's equity as an owner of such mutual insurer; and

(i) The plan, when completed, would provide for the converted insurer paid-in capital stock in an amount not less than the minimum paid-in capital required of a domestic stock insurer transacting like kinds of insurance, together with surplus funds in amount not less than one-half of such required capital.

History: En. Sec. 461, Ch. 286, L. 1959.

40-4745. Mergers and consolidations of stock insurers. (1) A domestic stock insurer may merge or consolidate with one or more domestic or foreign stock insurers authorized to transact insurance in this state, by complying with the applicable provisions of the statutes of this governing the merger or consolidation of stock corporations formed for profit, but subject to subsections (2) and (3) below.

(2) No such merger or consolidation shall be effectuated unless in advance thereof the plan and agreement therefor have been filed with the commissioner and approved in writing by him after a hearing thereon. The commissioner shall give such approval within a reasonable time after such filing unless he finds such plan or agreement:

(a) Is contrary to law; or

(b) Inequitable to the stockholders of any domestic insurer involved;
or

(c) Would substantially reduce the security of and service to be rendered to policyholders of the domestic insurer in this state or elsewhere.

(3) No director, officer, agent or employee of any insurer party to such merger or consolidation shall receive any fee, commission, compensation or other valuable consideration whatsoever for in any manner aiding, promoting or assisting therein except as set forth in such plan or agreement.

(4) If the commissioner does not approve any such plan or agreement he shall so notify the insurer in writing specifying his reasons therefor.

(5) If any domestic insurer involved in the proposed merger or consolidation is authorized to transact insurance also in other states, the commissioner may request the insurance commissioner, director of insurance, superintendent of insurance or other similar public insurance supervisory official of the two other such states in which such insurer has in force the larger amounts of insurance, to participate in the hearing provided for under subsection (2) above, with full right to examine all witnesses and evidence and to offer to the commissioner such pertinent information and suggestions as they may deem proper.

(6) Any plan or proposal through which a stock insurer proposes to acquire a controlling stock interest in another stock insurer through an exchange of stock of the first insurer, issued by the insurer for the purpose, for such controlling stock of the second insurer is deemed to be a plan or proposal of merger of the second insurer into the first insurer for the purposes of this section and is subject to the applicable provisions hereof.

History: En. Sec. 462, Ch. 286, L. 1959.

Collateral References

Insurance 47.

44 C.J.S. Insurance §§ 115-118.

40-4746. Mergers and consolidations, mutual insurers. (1) A domestic mutual insurer shall not merge or consolidate with a stock insurer.

(2) A domestic mutual insurer may merge or consolidate with another mutual insurer under the applicable procedures prescribed by the statutes of this state applying to corporations formed for profit, except as herein-below provided.

(3) The plan and agreement for merger or consolidation shall be submitted to and approved by at least two-thirds of the members of each mutual insurer involved voting thereon at meetings called for the purpose pursuant to such reasonable notice and procedure as has been approved by the commissioner. If a life insurer, right to vote may be limited to members whose policies are other than term and group policies, and have been in effect for more than one year.

(4) No such merger or consolidation shall be effectuated unless in advance thereof the plan and agreement therefor have been filed with the commissioner and approved by him in writing after a hearing thereon. The commissioner shall give such approval within a reasonable time after such filing unless he finds such plan or agreement:

(a) Inequitable to the policyholders of any domestic insurer involved; or

(b) Would substantially reduce the security of and service to be rendered to policyholders of the domestic insurer in this state and elsewhere.

(5) If the commissioner does not approve such plan or agreement he shall so notify the insurers in writing specifying his reasons therefor.

(6) Section 40-4745 (5) shall also apply as to mergers and consolidations of such mutual insurers.

History: En. Sec. 463, Ch. 286, L. 1959.

Collateral References

Insurance 67.

44 C.J.S. Insurance §§ 115-118.

29 Am. Jur. 505, Insurance, § 90.

40-4747. Bulk reinsurance, stock insurers. (1) A domestic stock insurer may reinsure all or substantially all of its insurance in force or a major class thereof, with another insurer by an agreement of bulk reinsurance; but no such agreement shall become effective unless filed with the commissioner and approved by him in writing after a hearing thereon.

(2) The commissioner shall approve such agreement within a reasonable time after such filing unless he finds that it is inequitable to the stockholders of the domestic insurer or would substantially reduce the protection or service to its policyholders. If the commissioner does not approve the agreement he shall so notify the insurer in writing specifying his reasons therefor.

History: En. Sec. 464, Ch. 286, L. 1959.

40-4748. Bulk reinsurance, mutual insurers. (1) A domestic mutual insurer may reinsure all or substantially all its business in force, or all or substantially all of a major class thereof, with another insurer, stock or mutual, by an agreement of bulk reinsurance after compliance with this section. No such agreement shall become effective unless filed with the commissioner and approved by him in writing after a hearing thereon.

(2) The commissioner shall approve such agreement within a reasonable time after filing if he finds it to be fair and equitable to each domestic insurer involved, and that such reinsurance if effectuated would not substantially reduce the protection or service to its policyholders. If the commissioner does not so approve, he shall so notify each insurer involved in writing specifying his reasons therefor.

(3) The plan and agreement for such reinsurance must be approved by vote of not less than two-thirds of each domestic mutual insurer's members voting thereon at meetings of members called for the purpose, pursuant to such reasonable notice and procedure as the commissioner may approve. If a life insurer, right to vote may be limited to members whose policies are other than term or group policies, and have been in effect for more than one year.

(4) If for reinsurance of a mutual insurer in a stock insurer, the agreement must provide for payment in cash to each member of the insurer entitled thereto as upon conversion of such insurer pursuant to section 40-4744, of his equity in the business reinsured as determined under a fair formula approved by the commissioner, which equity shall be based upon such member's equity in the reserves, assets (whether or not "admitted" assets), and surplus, if any, of the mutual insurer to be taken over by the stock insurer.

History: En. Sec. 465, Ch. 286, L. 1959.

40-4749. Mutual member's share of assets on liquidation. (1) Upon any liquidation of a domestic mutual insurer, its assets remaining after discharge of its indebtedness, policy obligations, repayment of contributed or borrowed surplus, if any, and expenses of administration, shall be distributed to existing persons who were its members at any time within thirty-six months next preceding the date such liquidation was authorized or ordered, or date of last termination of the insurer's certificate of authority, whichever date is the earlier.

(2) The distributive share of each such member shall be in the proportion that the aggregate premiums earned by the insurer on the policies of the member during the combined periods of his membership bear to the aggregate of all premiums so earned on the policies of all such members. The insurer may, and if a life insurer shall, make a reasonable classification of its policies so held by such members, and a formula based upon such classification, for determining the equitable distributive share of each such member. Such classification and formula shall be subject to the approval of the commissioner.

History: En. Sec. 466, Ch. 286, L. 1959.

40-4750. Extinguishment of unused corporate charters. (1) The corporate charter of any corporation formed under the laws of this state more than three years prior to the effective date of this code for the purpose of becoming an insurer, and which corporation within such three-year period has not actively engaged in business as a domestic insurer under a certificate of authority issued to it by the commissioner under laws then in force, is hereby extinguished and nullified.

(2) The corporate charter of any other corporation formed under the laws of this state for the purpose of becoming an insurer, and which corporation during any period of thirty-six consecutive months after the effective date of this code is not actively engaged in business as a domestic insurer under a certificate of authority issued to it by the commissioner under law currently in force, is automatically hereby extinguished and nullified at the expiration of such 36-month period.

(3) The period during which any such corporation referred to in subsection (2) above is the subject of delinquency proceedings under chapter 51 of this title shall not be counted as part of any such 36-month period.

(4) Upon merger or consolidation of a domestic insurer with another insurer under this chapter, the corporate charter of such merged or consolidated domestic insurer shall thereby automatically be extinguished and nullified.

History: En. Sec. 467, Ch. 286, L. 1959.

CHAPTER 48

FARM MUTUAL INSURERS

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40-4801. Scope of chapter—provisions exclusive. (1) The chapter applies to:

(a) All domestic mutual hail, fire and other casualty insurers of farm property and stock and rural buildings heretofore formed and immediately prior to the effective date of this code lawfully transacting insurance under sections 40-1501 through 40-1517 (and all amendments thereto) of the Revised Codes of Montana, 1947.

(b) All domestic mutual rural insurers heretofore formed and immediately prior to the effective date of this code lawfully transacting insurance under sections 40-1601 through 40-1625 (and all amendments thereto) of the Revised Codes of Montana, 1947.

(c) All insurers hereafter formed under this chapter.

(2) All such insurers may be referred to as “farm mutual insurers.”

(3) Nothing in the insurance laws of this state shall be deemed to apply to or govern either directly or indirectly domestic farm mutual insurers except as contained or referred to in this chapter.

History: En. Sec. 468, Ch. 286, L. 1959.

Cross-Reference

State board of hail insurance, secs. 82-1501 to 82-1519.

40-4802. “County” and “state” insurers defined. (1) An insurer authorized to insure property throughout the state is a “state” mutual insurer.

(2) An insurer authorized to insure only property located in the county wherein is located its principal office and in the counties in this state with boundaries contiguous with such principal office county is a “county” mutual insurer.

History: En. Sec. 469, Ch. 286, L. 1959.

40-4803. Insuring powers, in general. (1) A farm mutual insurer shall insure against loss or damage by fire or other casualty only:

(a) Farm dwellings and buildings, including the usual contents therein, farm livestock, machinery, vehicles, growing crops and other forms of farm property owned by a member of such insurer or by his spouse.

(b) Dwellings designed for occupancy by not over two families, together with the usual contents thereof, situated in an incorporated city or town if such property is owned by a member of the insurer or by his spouse, and if such member has other insurance of farm property with the insurer for a substantial amount.

(c) Rural schoolhouses and buildings used in connection therewith, rural community houses or rural churches, or other rural public buildings.

(2) Except as provided in subsection (1) (c) above, an insurer shall not insure any property not owned by a member or by his spouse.

(3) An insurer shall not insure any property situated within the limits of incorporated towns or cities except as provided in subsection (1) (b) above; and shall not so insure unless it has and maintains the surplus funds as required under section 40-4815 of this chapter.

History: En. Sec. 470, Ch. 286, L. 1959.

Collateral References

Insurance Ⓒ 57.

44 C.J.S. Insurance § 110.

40-4804. Limit of risk. (1) The maximum amount of insurance which an insurer shall retain on a single risk, after deduction of applicable reinsurance, shall not exceed ten per cent (10%) of the admitted assets of the insurer or five thousand dollars, whichever is the larger amount.

(2) For the purposes of this section, a "single risk" as to insurance against fire and hazards other than windstorm, earthquake, or other catastrophic perils, includes all properties insured by the same insurer which are reasonably susceptible to loss or damage from the same fire or the same occurrence of such other hazard insured against.

History: En. Sec. 471, Ch. 286, L. 1959.

40-4805. Reinsurance. A farm mutual insurer may cede reinsurance to any other farm mutual insurer or insurers, and to other authorized property insurers, and may accept reinsurance from other farm mutual insurers.

History: En. Sec. 472, Ch. 286, L. 1959.

Collateral References

Insurance Ⓒ 676.

46 C.J.S. Insurance § 1221.

40-4806. Cash premium or assessment plans. (1) An insurer may transact business either on the cash premium plan altogether, or on the assessment plan altogether, whichever plan is provided for in its articles of incorporation or bylaws.

(2) If transacting business on the cash premium plan, the insurer shall collect from each member before or at the time of effectuation of the member's insurance the premium in cash in such amount as the insurer deems will be adequate to cover losses and expenses incurred during the term of such insurance.

(3) If transacting business on the assessment plan, the insurer will depend for the payment of losses and expenses principally upon assessments from time to time levied upon members either before or after such losses or expenses have been incurred. This provision shall not be construed, however, as preventing any such insurer from collecting from each member such initial amount as it may deem proper prior to or at the time of the effectuation of the member's insurance; nor shall it be deemed to prohibit the acquisition, accumulation and maintenance of surplus or unallocated funds.

(4) An insurer transacting business on the cash premium plan may nevertheless provide in its bylaws and policies for special assessment of

its members in event the cash premium charged is found by it to be inadequate to pay in full losses and expenses currently incurred. The bylaws shall provide a specific limitation as to the amount which can be so assessed in any one policy year, such amount to be not less than one (1) nor more than six (6) times the premium charged on each member's policy at the annual rate for a term of one (1) year.

History: En. Sec. 473, Ch. 286, L. 1959.

40-4807. Who may form a farm mutual insurer. (1) One hundred (100) or more individuals residing in this state, each of whom is twenty-one (21) years of age or more, who collectively own farm property as referred to in section 40-4803 (1) (a) of this chapter valued at not less than five hundred thousand dollars (\$500,000) which they desire to insure, and each of whom owns farm lands or ranch lands situated in this state valued at not less than five thousand dollars (\$5,000), may incorporate a state mutual insurer.

(2) Twenty-five (25) or more individuals residing in this state, each of whom is twenty-one (21) years or more of age, each of whom owns farm land or ranch land valued at five thousand dollars (\$5,000) or more in the county wherein is to be located the principal office of the proposed insurer, or in any county in this state contiguous with such county, and who collectively own in such counties farm property referred to in section 40-4803 (1) (a) of this chapter valued at not less than one hundred twenty-five thousand dollars (\$125,000) which they desire to insure, may incorporate a county mutual insurer.

History: En. Sec. 474, Ch. 286, L. 1959.

Collateral References

Insurance \hookrightarrow 52.

44 C.J.S. Insurance § 105.

40-4808. Declaration of intention to incorporate—articles of incorporation. (1) The individuals proposing to form a farm mutual insurer as referred to in section 40-4807 shall file with the commissioner:

(a) A declaration of their intention to form such a corporation, which declaration shall be signed by at least one hundred (100) incorporators if a proposed state mutual insurer, or by at least twenty-five (25) incorporators if a proposed county mutual insurer; and

(b) Proposed articles of incorporation executed in quadruplicate by three (3) or more of the incorporators and acknowledged by each before a person authorized to take and verify acknowledgments of conveyance of real property.

(2) The articles of incorporation shall state:

(a) The name of the corporation; if a state mutual insurer, the words "farm mutual" must be a part of the name; if a county mutual insurer, the name shall contain the words "farm mutual," or "rural mutual" together with the name of the county wherein is to be located its principal place of business. The name shall not be so similar to one already used by a corporation in this state as to be misleading.

(b) If a county mutual insurer, the name of the county or counties in which the corporation is to transact insurance and the address where its principal business office will be located.

(c) If a state mutual insurer, the location of its principal business office, which office must be located in this state.

(d) The objects and purposes for which the corporation is formed.

(e) Whether it intends to transact business on the cash premium plan or the assessment plan.

(f) The duration of its existence, which may be perpetual.

(g) The number of its directors, which shall not be less than five (5) nor more than (11); also the names and addresses of the members of the initial board of directors appointed to manage the affairs of the corporation until the first annual meeting of the members, and until their successors are elected and qualified.

(h) Such other provisions, not inconsistent with law, deemed appropriate by the incorporators.

(i) The names, residences and addresses of the incorporators, and the value of the property desired insured owned by each in the county or counties where the operations of the corporation are to be carried on.

(3) At the time of filing of the articles of incorporation as provided in subsection (1) above, the incorporators shall pay to the commissioner a filing fee of ten dollars (\$10). The commissioner shall deposit all such fees with the state treasurer to the credit of the general fund of this state.

History: En. Sec. 475, Ch. 286, L. 1959.

Collateral References

Insurance ◊ 54.

44 C.J.S. Insurance § 107.

40-4809. Articles of incorporation—approval—commencement of corporate existence. (1) Upon receipt thereof, the commissioner shall forward the proposed articles of incorporation to the attorney general for examination. If the attorney general finds the articles to be in accordance with the provisions of this chapter, and not in conflict with the constitution and laws of the United States of America or of this state, he shall make a certificate of the facts and return it with the proposed articles to the commissioner.

(2) If the commissioner deems the name of the proposed corporation to be so similar to one already appropriated by another company or corporation as to be likely to mislead the public, he shall reject the name applied for and shall notify the incorporators thereof.

(3) When the proposed articles of incorporation have been approved by the attorney general, the commissioner shall likewise endorse his approval upon each set of the articles, file one set in his office and forward the other three sets of articles to the incorporators. The incorporators shall file one of such sets of articles with the secretary of state, one set with the commissioner bearing the certification of the secretary of state, and one set with the county clerk of the county wherein is located the principal place of business of the corporation, and shall pay to the secretary of state and the county clerk the customary filing fees. The remaining set of articles shall be made a part of the corporation's records.

(4) The corporation shall have legal existence as such upon the approval of the articles by the attorney general and the commissioner and completion of the filings referred to in subsection (3) above, but it shall not

transact business as an insurer until it has fulfilled the requirements for and has obtained a certificate of authority as provided in section 40-4816 of this chapter.

History: En. Sec. 476, Ch. 286, L. 1959.

40-4810. Amendment of articles of incorporation. A farm mutual insurer may, by a vote of two-thirds ($\frac{2}{3}$) of its members present at any annual meeting, or at any special meeting of members called for that purpose, amend its articles of incorporation to extend its corporate duration or in any particular within the scope of this chapter, by causing amended articles to be filed in the same form and manner as required for original articles of incorporation. The amended articles of incorporation shall be signed only by the president and secretary of the corporation, and attested by the corporate seal. Notice of the proposed amendment shall be contained in the notice given of any such annual or special meeting.

History: En. Sec. 477, Ch. 286, L. 1959.

Collateral References

Insurance \Rightarrow 54.

44 C.J.S. Insurance § 107.

40-4811. Certified copies of articles as evidence. A copy of the articles of incorporation of a farm mutual insurer, and any amendments thereof, filed pursuant to law and certified by the commissioner, shall be received in all courts and other places as prima facie evidence of the facts therein stated and of the due incorporation of the insurer.

History: En. Sec. 478, Ch. 286, L. 1959.

Collateral References

Evidence \Rightarrow 343(5).

32 C.J.S. Evidence § 660.

40-4812. Corporate powers—in general. (1) An insurance corporation formed under this chapter, or existing on the effective date of this code, and of a type which might be formed under this chapter shall have the same capacity to act possessed by individuals, but with authority to perform only such lawful acts as are necessary or proper to accomplish its purposes.

(2) Without affecting the authority contained in subsection (1) above, every such corporation shall have the following corporate powers:

(a) To have succession by its corporate name for the period stated in its articles.

(b) To sue and be sued in its corporate name.

(c) To adopt, use and alter a corporate seal.

(d) To acquire, hold, sell, use, dispose of, pledge or mortgage any such property as its purpose may require, subject to any limitation prescribed by law or the articles of incorporation.

(e) To transact insurance.

(f) To conduct its affairs through its directors, officers, employees, agents and representatives thereunto duly authorized.

(g) To make bylaws not inconsistent with law for the exercise of its corporate powers, the management, regulation and government of its affairs and property, including (but not limited to) calling and holding of meetings of its directors or members, and to modify or amend such bylaws.

(h) To exercise, subject to law and the express provisions of the articles of incorporation, all such incidental and subsidiary powers as may be necessary or convenient to the attainment of the objectives set forth in such articles.

(i) To dissolve and wind up, or be dissolved and wound up, in the manner provided by law.

History: En. Sec. 479, Ch. 286, L. 1959.

Collateral References

Insurance 57.

44 C.J.S. Insurance § 110.

40-4813. Initial qualifications. When applying for an original certificate of authority as an insurer newly organized in this state, the insurer must have surplus as required by section 40-4815 of this chapter, be otherwise qualified therefor under this code, and:

(1) If a county mutual insurer, it must have received acceptable bona fide written applications from twenty-five (25) separate persons for substantial insurance of the kinds of insurance proposed to be transacted, aggregating at least one hundred thousand dollars (\$100,000); and such applicants must have given to the insurer the obligations referred to in section 40-4843 of this chapter, or paid the premium required therefor, subject to the insurer qualifying to transact the kinds of insurance so applied for.

(2) If a state mutual insurer, it must have received acceptable bona fide written applications from one hundred (100) separate persons, each for substantial insurance, aggregating at least five hundred thousand dollars (\$500,000) of the kinds of insurance proposed to be transacted; and such applicants must have given to the insurer the obligations referred to in section 40-4843 of this chapter, or paid the premium required therefor, subject to the insurer qualifying to transact the kinds of insurance so applied for.

(3) If to insure growing crops against loss or damage by hail, it must have received applications for such hail insurance from not less than one hundred (100) persons resident in Montana owning in the aggregate not less than five thousand (5,000) acres of grain; and each such applicant must have given to the insurer the obligations referred to in section 40-4843 of this chapter, or paid the premium required therefor, subject to the insurer qualifying to transact insurance.

History: En. Sec. 480, Ch. 286, L. 1959.

Collateral References

Insurance 52.

44 C.J.S. Insurance § 105.

40-4814. "Surplus" defined. "Surplus" is the extent to which the value of an insurer's assets exceeds its liabilities.

History: En. Sec. 481, Ch. 286, L. 1959.

40-4815. Surplus funds required. A domestic farm mutual insurer may hereafter be authorized to transact insurance if otherwise in compliance with the applicable provisions of this chapter, if it has and thereafter maintains surplus funds as follows:

(1) If a state mutual insurer, surplus of not less than one hundred thousand dollars (\$100,000);

(2) If a county mutual insurer, surplus of not less than twenty thousand dollars (\$20,000); or

(3) If to insure growing crops against hail or other hazards, surplus in the amount of one hundred and fifty per cent (150%) of the amount otherwise required under this section. This provision (3) shall not apply as to any domestic insurer first authorized as such prior to January 1, 1956, which transacts business on the pro rata, nonassessable plan, under which plan a pro rata portion only of insured losses is paid in event advance premiums collected are inadequate to pay all such losses in full.

History: En. Sec. 482, Ch. 286, L. 1959.

40-4816. Certificate of authority required—issuance—renewal. (1) No farm mutual insurer shall insure any risk in this state unless it then holds a subsisting certificate of authority issued to it by the commissioner.

(2) Upon application therefor the commissioner shall issue such a certificate of authority to every insurer qualified therefor under this chapter.

(3) Every such certificate of authority shall expire at midnight on the April 30 next following its date of issuance, unless theretofore revoked for cause or otherwise terminated. Unless he finds that the insurer is not qualified therefor under this chapter, the commissioner shall issue to the insurer a renewal certificate of authority on or before May 1 of each year. The commissioner shall not issue any such renewal certificate of authority to any insurer which has not filed its annual statement and report of expenditures as required under section 40-4832 of this chapter.

(4) For each issuance and each renewal of its certificate of authority, the insurer shall pay to the commissioner a fee of five dollars (\$5), if a county mutual insurer, or twenty dollars (\$20), if a state mutual insurer, to be deposited by the commissioner with the state treasurer to the credit of the general fund of this state.

(5) A certificate of authority shall be subject to suspension or revocation by the commissioner for violation of or noncompliance with any provision of this chapter or referred to herein.

History: En. Sec. 483, Ch. 286, L. 1959.

40-4817. Bylaws—adoption, power to amend. Upon commencement of the legal existence of an insurer, its initial board of directors shall adopt such original bylaws, not inconsistent with the state constitution or this chapter, as may be deemed necessary for the management of its affairs. The bylaws shall be subject to the approval of the insurer's members at their next succeeding meeting. The members shall otherwise have the power to make, modify and revoke bylaws.

History: En. Sec. 484, Ch. 286, L. 1959.

40-4818. Bylaws—contents. (1) The bylaws of a farm mutual insurer shall provide:

(a) As to the liability of each member for payment of the expenses and losses of the insurer, and what obligations shall be given therefor when a person applies for insurance.

(b) As to the time when obligations of members for losses and expenses become due.

(c) For limitation of liability of members for the payment of expenses and losses of the insurer.

(d) The terms of office of the directors; at least part of the directors shall be elected at each annual meeting of members, and the term of any director shall not be longer than three (3) years.

(e) The date of the annual meeting of the members, at which vacancies existing or occurring on the board of directors are to be filled by election by the members. Each member shall be permitted to cast at least one vote, either in person or, if so authorized by the bylaws, by proxy, for each director to be elected, and may cumulate his votes for one or more directors, not exceeding the number to be elected.

(f) How directors are to be elected in case no election occurs at the annual meeting, or in event of resignation, disability or death of a director.

(g) The manner and time of giving notice of annual and special meetings of members.

(2) The bylaws may provide:

(a) The character of property to be insured, and under what restrictions and limitations.

(b) Restrictions and limitations as to membership and the powers, duties and obligations of the members other than as to obligations covered under subsection (1) (a) above.

(c) The manner of making and collecting assessments.

(d) The manner of the suspension and expulsion of members.

(e) The form of application and the form of policy.

(f) The manner of making proof, adjustment and payment of losses.

(g) As to who is authorized to adjust losses for the insurer.

(h) For arbitration as provided in section 40-4848 of this chapter, in event of the insurer's adjuster and any claimant cannot agree as to the amount of any insured damage or loss.

(i) The duties and compensation of the officers, and the bonds to be required of them.

(j) The books and records to be kept by the insurer, reports required of the officers and the manner of examining and auditing their accounts.

(k) What shall be contained on the corporate seal, and when the seal shall be required to be used.

(l) Such other matters as may be deemed necessary or convenient for the management of the affairs of the insurer.

History: En. Sec. 485, Ch. 286, L. 1959.

40-4819. Bylaws binding upon members. The bylaws of a farm mutual insurer are binding upon all of its members, and as from time to time amended are a part of the contracts of insurance between the insurer and its members.

History: En. Sec. 486, Ch. 286, L. 1959.

40-4820. Members—minimum membership. (1) No person may become a member of a farm mutual insurer except by insuring therein property owned by him so insurable under this chapter.

(2) The membership of such an insurer shall consist of the persons lawfully insuring therein.

(3) The total membership of the insurer shall at all times be not less than the number of persons required by section 40-4807 of this chapter to incorporate such an insurer.

History: En. Sec. 487, Ch. 286, L. 1959.

Collateral References

Insurance ⌘ 55.

44 C.J.S. Insurance § 108.

40-4821. Annual meetings of members—where held. Annual meetings of the members of a farm mutual insurer may be held at its principal business office or at any other place located in any county in this state in which the insurer is authorized to transact insurance.

History: En. Sec. 488, Ch. 286, L. 1959.

40-4822. Annual meeting, presentation of annual statement. The annual statement of the insurer as required to be filed with the commissioner under section 40-4832 of this chapter shall be presented at the annual meeting of the members of the insurer next following the end of the calendar year to which such statement relates.

History: En. Sec. 489, Ch. 286, L. 1959.

Collateral References

Insurance ⌘ 9.

44 C.J.S. Insurance § 73.

40-4823. Adjourned annual meetings—notice. Notice of any adjourned annual meeting of members shall be given to the members of an insurer in the same manner as provided in the insurer's bylaws for the regular annual meeting of members.

History: En. Sec. 490, Ch. 286, L. 1959.

40-4824. Members' voting rights. Each member of an insurer is entitled to one vote upon each matter coming to a vote at meetings of members of the insurer. A member may vote by written proxy if and as may be provided in the insurer's bylaws. No such proxy shall be made irrevocable or for longer than one year.

History: En. Sec. 491, Ch. 286, L. 1959.

Collateral References

Insurance ⌘ 55.

44 C.J.S. Insurance § 108.

40-4825. Members' liability, limitation. All liability of the members of a farm mutual insurer shall be as limited in the insurer's bylaws. As to insurers transacting business on the cash premium plan, the limitation shall comply with section 40-4806 (4) of this chapter. No member shall be required to pay more than the full amount of his obligation given to the insurer, or of his liability as provided for in the bylaws.

History: En. Sec. 492, Ch. 286, L. 1959.

Collateral References

Insurance ⌘ 192.

44 C.J.S. Insurance § 367.

40-4826. Withdrawal of member—Cancellation by insurer. (1) Any member of an insurer may withdraw therefrom by surrendering his policy

to the insurer for cancellation and paying all obligations then owing by him to the insurer.

(2) The insurer has power to cancel the policy of any member for any cause deemed adequate by the insurer and upon not less than ten (10) days' written notice in advance of cancellation delivered to the member or mailed to his address last of record with the insurer.

History: En. Sec. 493, Ch. 286, L. 1959.

Collateral References

Insurance—228, 229, 238-240.
45 C.J.S. Insurance §§ 445, 454.

40-4827. Board of directors—quorum. (1) The general management of the affairs of a farm mutual insurer is vested in its board of directors.

(2) A majority of the directors shall constitute a quorum to do business at any lawful meeting of the board.

History: En. Sec. 494, Ch. 286, L. 1959.

Collateral References

Insurance—56.
44 C.J.S. Insurance § 109.

40-4828. Directors—election, term. (1) Directors of a farm mutual insurer shall be elected by its members by ballot for terms not to exceed three (3) years, and shall hold office until their respective successors are elected and have qualified.

(2) No individual shall serve as a director unless a member of the insurer.

History: En. Sec. 495, Ch. 286, L. 1959.

40-4829. Officers. The board of directors of an insurer shall elect from their number a president and vice-president. The board shall also elect a secretary and treasurer or a secretary-treasurer, who may or may not be members of the insurer. Officers shall hold their offices for one (1) year, and until their successors are elected and qualified, unless earlier removed by the board of directors.

History: En. Sec. 496, Ch. 286, L. 1959.

40-4830. Bonds of officers. The treasurer and secretary of an insurer shall each give bonds to the insurer for the faithful performance of their duties, in such amount as is designated by the board of directors. Any such bond shall be one issued by an authorized corporate surety.

History: En. Sec. 497, Ch. 286, L. 1959.

40-4831. Officers, agents and employees not licensed. No agent of an insurer shall be required to obtain a license or authority from any public official to transact business for such insurer, nor shall the insurer or any of its officers, agents or employees be required to pay any fee or license for the transaction of the business of the insurer, except as provided in this chapter.

History: En. Sec. 498, Ch. 286, L. 1959.

Collateral References

Insurance—12.
44 C.J.S. Insurance § 85.

40-4832. Annual statement—report—must be filed with commissioner.
(1) The president and secretary of every insurer, on or before the first

day of March each year, shall prepare, affirm under oath, affix the corporate seal thereto and file with the commissioner, on forms as prescribed and furnished by him, an annual statement for the preceding calendar year showing the condition of such insurer as of December 31 of such year and exhibiting the following facts:

- (a) The names of the president and secretary.
- (b) The date of the annual meeting.
- (c) The amount of insurance in force.
- (d) The number of members.
- (e) The number of assessments made during the year.
- (f) The amount paid in losses during the year.
- (g) The amount of the losses claimed and not paid, with the reason for nonpayment.
- (h) The number of members withdrawn, suspended and expelled during the year.
- (i) The number of new members admitted during the year.
- (j) The expenses during the year.
- (k) The amount of money on hand.
- (l) The amount and character of the insurer's assets.
- (m) The amount of the insurer's liabilities, including any reserves required to be established under this chapter.
- (n) Such other information concerning the insurer's affairs as the commissioner may reasonably require.

(2) A report of an insurer's expenditures for educational purposes, if any, for the preceding year must be filed with the commissioner at the same time and in conjunction with the annual report of such insurer, as required under section 40-4836.

(3) A copy of such annual statement and report of expenditures for educational purposes shall be filed by each county mutual insurer with the county clerk and recorder of the county wherein is located its principal place of business.

History: En. Sec. 499, Ch. 286, L. 1959.

Collateral References

Insurance 9.

44 C.J.S. Insurance § 73.

40-4833. Annual statement—exclusive report—penalty for failure to file. (1) No report, statement or return of any nature shall be required of any farm mutual insurer other than those required by section 40-4832 of this chapter.

(2) The commissioner may suspend or revoke the certificate of authority of any insurer failing to file its annual statement as required.

History: En. Sec. 500, Ch. 286, L. 1959.

Collateral References

Insurance 9.

44 C.J.S. Insurance § 73.

40-4834. Examination by commissioner—expense. (1) The commissioner has power, at any time, to investigate and examine the affairs and books of any insurer.

(2) The charges to be paid by the insurer to the commissioner and his examiners for investigation and examinations provided for in subsection

(1) above shall not exceed one hundred dollars (\$100) in any one calendar year unless otherwise expressly authorized by the insurer.

History: En. Sec. 501, Ch. 286, L. 1959.

40-4835. Investments. (1) When so directed by a majority vote of its members present at a duly called and held meeting of members, the directors of a farm mutual insurer shall have power to invest the insurer's funds or any part thereof in any of the following:

(a) Bonds or other securities issued by the United States government or by any agency thereof.

(b) Bonds or other obligations the payment of the interest and principal of which is assumed or guaranteed by the United States government or any agency thereof.

(c) General obligation bonds or warrants of any state, county or city, when recommended by the commissioner and approved by the state examiner.

(d) Loans secured by a first mortgage on real estate situated in the state of Montana, but subject to the provisions of subsection (3), below.

(2) At the time of making any such investment the document evidencing the same must be stamped with the name of the insurer with the following notation printed or written thereon: "Negotiable only upon the order of the Board of Directors of _____ (naming the insurer)."

(3) No real estate loan shall be for more than sixty per cent (60%) of the appraised value of the real estate securing the loan, and the appraisal must have been made within thirty (30) days prior to the date of the loan. No such loan shall be for a term longer than ten (10) years. The foregoing provisions shall not be deemed to prevent the renewal or extension of loans already made, and shall not apply to real estate loans which are insured under the provisions of any act of the Congress of the United States, nor to the making, extension or renewal of any loans which are made under subchapter II of the Act of Congress known as the "Servicemen's Readjustment Act of 1944," or any amendment thereof or supplement thereto, as to any part of such loans; nor shall such provisions be deemed to prevent an insurer from taking another and immediately subsequent mortgage or deed of trust when it already holds a first mortgage or deed of trust on the same real estate, nor from accepting a second lien on real estate to secure the payment of a debt previously contracted in good faith; nor shall it prevent subsequent liens of any kind from being taken to secure the payment of a debt previously contracted in good faith when in the judgment of the insurer's board of directors such subsequent liens are necessary further to secure the payment of any debts and save the insurer from loss.

History: En. Sec. 502, Ch. 286, L. 1959.

40-4836. Expenditure of funds for educational purposes. An insurer may spend in any one year up to five per cent (5%) of its net earnings of the preceding year for educational purposes. A complete and itemized

report of such expenditures shall be filed by the insurer as part of its annual report required under section 40-4832.

History: En. Sec. 503, Ch. 286, L. 1959.

40-4837. Safety fund. (1) Any domestic farm mutual insurer may create a "safety" fund, in addition to any surplus required under section 40-4815 or reserve otherwise required, for the purpose of paying insured losses or lawful expenses or obligations of the insurer as they are incurred.

(2) The safety fund shall not exceed in amount three per cent (3%) of the total amount of insurance in force in the insurer.

(3) The safety fund shall not be used for any purpose except as specified in subsection (1) above.

History: En. Sec. 504, Ch. 286, L. 1959.

Collateral References

Insurance—58.

44 C.J.S. Insurance § 112.

40-4838. Reserves—cash premium plan. Each insurer transacting business on the cash premium plan shall maintain the following reserves:

(1) A loss reserve, in amount reasonably adequate to pay in full all losses already incurred but currently unpaid. The amount subsequently paid on such losses shall be credited against this reserve.

(2) A reserve for unearned premiums, which reserve shall be computed at fifty per cent (50%) of net premiums (gross premiums less premiums returned) charged and collected for unexpired policy periods that commenced during the calendar year covered by the financial statement, plus one hundred per cent (100%) of such net premiums charged and collected in advance for policy periods that are to commence after such calendar year. Or in the alternative, the insurer may at its option compute its entire reserve for unearned premiums as the aggregate amount of the pro rata unearned premiums for each policy in force as at the end of the calendar year to be covered by the financial statement.

History: En. Sec. 505, Ch. 286, L. 1959.

40-4839. Profits or dividends. No insurer shall accumulate any profits as such or pay any dividends. This provision shall not be deemed to prohibit an insurer from accumulating and maintaining surplus funds as required to be maintained by it under this chapter, or a "safety" fund as authorized under section 40-4837, or from accumulating and maintaining other voluntary reserves for such purposes and in such amounts as may be reasonable. Limitations upon any such accumulations and the purposes thereof may be provided for in the insurer's bylaws.

History: En. Sec. 506, Ch. 286, L. 1959.

Collateral References

Insurance—59.

44 C.J.S. Insurance § 114.

40-4840. Deficiency of surplus. If the surplus funds of a farm mutual insurer at any time fall below the amount required to be maintained under this chapter, the insurer shall cure such deficiency within six (6) months thereafter, notwithstanding that new losses or expenses may be incurred within such six (6) months' period. If the deficiency is not so cured, the commissioner may, upon the insurer's written application therefor, allow

an additional reasonable period, not to exceed six (6) months, for the curing of the deficiency. If the deficiency is not so cured within the first six (6) months' period (if additional time is not so applied for) or within such additional period as the commissioner may so allow, the commissioner shall forthwith suspend or revoke the insurer's certificate of authority.

History: En. Sec. 507, Ch. 286, L. 1959.

40-4841. Records. A farm mutual insurer, through its president and secretary, shall keep or cause to be kept accurate records and accounts of its transactions. The books, files and records of the insurer shall be located at its principal place of business or, in the case of a county mutual insurer, at such place within the county of its principal place of business as may be designated by the insurer's board of directors and shown in the minutes of the board. The books, files and records of the insurer shall be available for inspection by the insurer's directors and officers, and by the commissioner or his duly constituted examiner, at all reasonable times.

History: En. Sec. 508, Ch. 286, L. 1959.

40-4842. Fees and taxes. Except for the fees for filing articles of incorporation as provided in sections 40-4808 and 40-4809, for issuance and renewal of certificate of authority as provided in section 40-4816, and for costs of examination by the commissioner as limited in section 40-4834 (2), domestic farm mutual insurers shall not be subject to any other or additional fees or taxes of any kind, except for the usual ad valorem taxes upon real estate and tangible personal property of the insurer.

History: En. Sec. 509, Ch. 286, L. 1959.

40-4843. Application for insurance. All persons desiring insurance shall make written application therefor to the insurer. If the insurer is transacting business on the assessment plan, the applicant shall at the time of application give his obligation to the insurer for the payment of losses and expenses as provided in the insurer's bylaws, and make such advance payment in cash as insurer may require.

History: En. Sec. 510, Ch. 286, L. 1959.

40-4844. Application and policy forms filed with commissioner. All forms of application for insurance and of policies proposed to be used by an insurer shall be filed with the commissioner at least thirty (30) days in advance of any such use. The commissioner shall disapprove any such form found by him to be unlawful, illegible or misleading. An insurer shall not use any such form after it has received the commissioner's notice of disapproval setting forth the reasons therefor.

History: En. Sec. 511, Ch. 286, L. 1959.

40-4845. Rates—filing, discrimination. A farm mutual insurer is not required to file any of its insurance rates with the commissioner. No such rate shall be unfairly discriminatory as between subjects of insurance covered for like perils under like policies and having substantially the same insuring, exposure and underwriting characteristics.

History: En. Sec. 512, Ch. 286, L. 1959.

40-4846. Insurance of schools, community houses, churches. (1) No contract of insurance effected upon the property of any school district, rural community house, rural church or rural public building pursuant to section 40-4803 of this chapter shall be deemed to constitute such school district, or the owners of any such community house, church or public building, a member of the insurer.

(2) No contract of insurance effected upon any rural school building, rural community house, rural church or other rural public building referred to in section 40-4803 (1) (c) of this chapter shall be invalid because the directors or any director or officer of the insurer, at the time of effecting the insurance coverage was a trustee, director, agent, custodian or manager, or in any way in control, supervision or management of any or all of the property so insured.

History: En. Sec. 513, Ch. 286, L. 1959.

40-4847. Losses—notice—adjustment. (1) Every member of a domestic farm mutual insurer who has sustained any insured loss or damage shall immediately notify the insurer's secretary thereof and of the amount of damage or loss claimed.

(2) Upon receipt of the notice of loss referred to in subsection (1) above, the secretary shall notify the person or persons authorized by the bylaws of such insurer to ascertain the amount of the loss or damage and adjust the same.

History: En. Sec. 514, Ch. 286, L. 1959.

40-4848. Arbitration—committee—compensation. (1) If any insurer's adjuster and a claimant fail to agree as to the amount of the insured loss or damage sustained by the claimant, and if so provided for in the insurer's bylaws, the matter shall be submitted to three persons as a committee of reference, one of whom shall be selected by the claimant, one by the insurer and the third by such two persons, all of whom shall be sworn to a faithful and impartial investigation and award.

(2) The committee of reference shall have authority to examine witnesses and determine all matters in dispute. The decision or award of the committee shall be made in writing to the secretary of the insurer. If it relates to any claimed loss or damage to a crop, the decision or award shall not be made until after maturity of such crop. The decision or award of the committee shall be final and binding upon all parties, unless an interested party appeals to the court within thirty (30) days thereafter.

(3) The compensation of each member of any such committee shall be at the rate of ten dollars (\$10) per day for each day of service in the discharge of his duties. Such compensation shall be paid by the claimant, unless the award of the committee exceeds the sum theretofore offered by the insurer in settlement of the claim and in which case the compensation shall be paid by the insurer.

History: En. Sec. 515, Ch. 286, L. 1959.

Collateral References

Insurance 567.

45 C.J.S. Insurance § 1114.

40-4849. Obligations or assessments due—losses payable. (1) Obligations or assessments of members for losses and expenses become due and

payable at such time as may be provided in the bylaws of the insurer, and the insurer shall use due diligence to collect each obligation or assessment.

(2) Any valid claim for an insured loss against an insurer transacting business on the assessment plan shall not be payable by the insurer until thirty (30) days after such obligations of the members are due and payable.

History: En. Sec. 516, Ch. 286, L. 1959.

Collateral References

Insurance—195, 196.

44 C.J.S. Insurance §§ 369, 372.

40-4850. Suit to collect obligations—liability of directors or officers.

(1) An insurer may institute a suit against any member of such insurer if the member fails to pay when due any obligation or liability of the member given such insurer under the provisions of this chapter.

(2) The directors or officers of an insurer are liable in their individual capacity to the person sustaining an insured loss, if they willfully refuse or neglect to perform the duties imposed upon them by the provisions of this section.

History: En. Sec. 517, Ch. 286, L. 1959.

Collateral References

Insurance—197.

46 C.J.S. Insurance § 1244.

40-4851. Proportionate payment of losses. If the aggregate whole amount of the members' obligations to an insurer transacting business on the assessment plan are insufficient to pay all valid claims for losses under the insurer's contracts of insurance after necessary expenses in any one year, then such claimants insured by the insurer shall receive their proportionate share of the funds realized from such obligations in full satisfaction of such losses.

History: En. Sec. 518, Ch. 286, L. 1959.

40-4852. Suit to collect for loss. If the insurer fails to pay any insured loss when due, an action may be maintained against it to collect for such loss, but subject to section 40-4851 as to assessment plan insurers.

History: En. Sec. 519, Ch. 286, L. 1959.

40-4853. Other provisions applicable. The following chapters and sections of this title also shall apply to farm mutual insurers to the extent so applicable and not inconsistent with the express provisions of this chapter and the reasonable implications of such express provisions:

- (1) Chapter 26 (scope of code).
- (2) Chapter 27 (the commissioner of insurance).
- (3) The following sections of chapter 30 (assets and liabilities):
 - (a) Section 40-3001 ("assets" defined).
 - (b) Section 40-3003 (assets not allowed).
 - (c) Section 40-3013 (valuation of bonds).
 - (d) Section 40-3014 (valuation of other securities).
 - (e) Section 40-3015 (valuation of property).
 - (f) Section 40-3016 (valuation of purchase money mortgages).
- (4) Chapter 35 (trade practices and frauds).
- (5) The following sections of chapter 47 (organization, corporate procedures of domestic stock and mutual insurers):

- (a) Section 40-4723 (prohibited pecuniary interest of officials).
- (b) Section 40-4725 (home office and records—penalty for unlawful removal of records).
- (c) Section 40-4726 (vouchers for expenditures).
- (d) Section 40-4738 (borrowed surplus).
- (e) Section 40-4746 (mergers and consolidations, mutual insurers).
- (f) Section 40-4748 (bulk reinsurance, mutual insurers).
- (g) Section 40-4749 (mutual member's share of assets on liquidation).
- (h) Section 40-4750 (extinguishment of unused corporate charters).
- (6) Chapter 51 (rehabilitations and liquidations).

History: En. Sec. 520, Ch. 286, L. 1959.

CHAPTER 49

BENEVOLENT ASSOCIATIONS

- Section 40-4901. Scope of chapter—provisions exclusive.
 40-4902. "Benevolent association" defined.
 40-4903. "Member"—"member in good standing"—defined.
 40-4904. Membership contract.
 40-4905. "Officer" defined.
 40-4906. New benevolent associations prohibited—foreign associations.
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 40-4908. Officers—number—bond.
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 40-4910. Officers as agents.
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 40-4914. Payment of death claims.
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 40-4916. Annual statement.
 40-4917. Other provisions applicable.

40-4901. Scope of chapter—provisions exclusive. (1) This chapter applies only to benevolent associations.

(2) No provisions of this code shall apply to any such association unless contained or referred to in this chapter.

History: En. Sec. 521, Ch. 286, L. 1959.

46 C.J.S. Insurance § 1435.

Collateral References

38 Am. Jur. 440, Mutual Benefit Societies, §§ 1 et seq.

Insurance Ⓒ687.

40-4902. "Benevolent association" defined. (1) Any corporation, association or society, or by whatever name called, which issues any certificate, policy, membership agreement, or makes any promise or agreement with its members, whereby, upon decease of a member, any money or other benefit, charity, aid or relief is to be paid, provided or rendered by such corporation, association or society to his legal representatives, or to the beneficiary designated by him, which money, benefit, charity, aid or relief is derived from voluntary donations, or from admission fees, dues or assessments, or any of them collected or to be collected from the members thereof, or members of a class therein, or interest or accretions thereon, or accumulations thereof; and wherein the money or other benefit, charity, aid or relief, so realized, is applied to or accumulated for the uses and

purposes herein specified, and/or the uses of such corporation, association or society, and/or the expenses of management and prosecution of its business, shall be deemed to be a "benevolent association" for the purposes of this chapter.

(2) The definition of benevolent association in subsection (1) above is not applicable to:

(a) Burial or death benefits, annuities, endowments or any other benefit payments of any legal reserve life or disability insurer, or of any labor union, railroad brotherhood, or lodge having as a primary business the improvement of working conditions; or

(b) Any ladies auxiliaries to any labor union, railroad brotherhood or lodge referred to in subdivision (a) above; or

(c) The benevolent plans within fraternal orders if limited to members and if the plan is not the principal object for the formation or continuance of the fraternal order.

History: En. Sec. 522, Ch. 286, L. 1959.

40-4903. "Member"—"member in good standing"—defined. A "member" or "member in good standing" is an individual who must contribute to a benevolent association upon notice of assessment.

History: En. Sec. 523, Ch. 286, L. 1959.

40-4904. Membership contract. (1) "Membership contract" is any certificate, policy, membership agreement, by whatever name called, or any promise or agreement, of a benevolent association with any or all of its members, whereby any money or other benefit, charity, aid or relief is to be paid, provided or rendered by such association upon the decease of a member to his legal representatives, or to the beneficiary or beneficiaries designated by him.

(2) There shall be one contributing member for each membership contract, but a membership contract may cover more than one individual.

History: En. Sec. 524, Ch. 286, L. 1959.

40-4905. "Officer" defined. "Officer" is any of the individuals having supervision and control of a benevolent association, and engaging in the management and the prosecution of the business thereof, whether designated as officers, trustees, comptrollers, managers or by whatever name called.

History: En. Sec. 525, Ch. 286, L. 1959.

40-4906. New benevolent associations prohibited—foreign associations.

(1) No benevolent association shall transact or be authorized to transact any business in this state unless it lawfully had authority to transact such business as such an association immediately prior to the effective date of this code.

(2) No new benevolent association shall hereafter be organized or formed in this state.

(3) No association formed or existing under the laws of any other state or jurisdiction shall be authorized to transact business in this state.

History: En. Sec. 526, Ch. 286, L. 1959.

40-4907. Amendments filed with commissioner. Each benevolent association shall promptly file with the commissioner a copy, certified to by its president and secretary, of each of the following:

(1) If incorporated, any amendment of articles of incorporation or of bylaws;

(2) If not incorporated, any amendment of articles of association, of agreement or of rules or agreements with its members.

(3) Any modification of its form of membership contracts.

History: En. Sec. 527, Ch. 286, L. 1959.

40-4908. Officers—number—bond. (1) Each benevolent association shall be in the charge of its officers, and shall not have more than five (5) officers.

(2) The treasurer and any other officer having charge of any funds of a benevolent association shall each be bonded in the amount of one thousand dollars (\$1,000), executed to the state of Montana, joint and several, for the use and benefit of the members or beneficiaries of such association. Each such bond shall be on file in the principal office and address of the association and a certified copy thereof must be filed with the commissioner.

History: En. Sec. 528, Ch. 286, L. 1959.

40-4909. Agents—license. Agents for any benevolent association may be appointed in accordance with chapter 33 of this title, and shall be subject to the applicable provisions of such chapter, except as provided in section 40-4910. No such agent may be appointed if there are less than three (3) officers in charge of the association.

History: En. Sec. 529, Ch. 286, L. 1959.

40-4910. Officers as agents. Not exceeding five (5) officers of any benevolent association may act for the association without obtaining a license as an agent. Such officers shall be subject to the jurisdiction of the commissioner in the same manner as though they were licensed as agents under chapter 33 of this title.

History: En. Sec. 530, Ch. 286, L. 1959.

40-4911. Receipts for payment to association. Every benevolent association shall issue a receipt or other evidence of payment to each person making a payment of any kind to the association.

History: En. Sec. 531, Ch. 286, L. 1959.

40-4912. Minimum membership. Each benevolent association shall have at all times not less than two hundred (200) members in good standing.

History: En. Sec. 532, Ch. 286, L. 1959.

40-4913. Expenses—assessment for expenses—shown in annual statement. (1) The total expenses of any benevolent association during any calendar year shall not exceed the larger of the following:

(a) Ten per cent (10%) of the total amount received during such year, whether as assessments, dues, donations or by whatever name called, except fees collected for new memberships; or

(b) Fifteen dollars (\$15) per death loss incurred during such year.

(2) Such an association may, instead of providing for expenses as in subsection (1) above, assess each of its members for expenses at an amount not to exceed three dollars (\$3) per calendar year, except that such assessment shall not exceed four dollars (\$4) per year where a membership certificate includes within its protection a family group consisting of two (2) or more persons. The proceeds of such assessments shall be placed in an expense fund out of which all of the expenses of the association for such year shall be paid. The association shall show the condition of such expense fund in its annual statement.

(3) The association shall state in its annual statement whether the expenses as to be shown in its next annual statement will be determined as in subsection (1) above, or whether the members will be assessed for the same as in subsection (2) above. No association shall use both methods, nor a combination of such methods.

History: En. Sec. 533, Ch. 286, L. 1959.

40-4914. Payment of death claims. (1) Each completed proof of claim for death of a member of a benevolent association shall be assigned a number by the association in consecutive order of receipt for each calendar year.

(2) Payment in full on final settlement of death benefits shall be made by the association to the legal heir or heirs, or the designated beneficiary or beneficiaries, within twenty (20) days after the expiration date stated in the association's notice referred to in section 40-4915 (1) (c).

History: En. Sec. 534, Ch. 286, L. 1959.

40-4915. Assessment for death benefit—notice—procedure. (1) Within thirty (30) days after a benevolent association receives a completed proof of claim for death of a member, it must mail to each of its members in good standing an assessment notice stating:

- (a) The name, date and place of death of the deceased member;
- (b) The number of the proof of death claim assigned thereto by the association;
- (c) The amount of the assessment and the expiration date of the assessment payment; and
- (d) The number of members in good standing to whom such notices are being sent, as computed from the last completed assessment.

(2) At the time of mailing the assessment notice required by (1) above, the association shall send a duplicate thereof to the commissioner for filing, together with information as to the mailing of the notice to members.

History: En. Sec. 535, Ch. 286, L. 1959.

40-4916. Annual statement. (1) In addition to compliance with section 40-2820, the annual statement of a benevolent association shall exhibit the following items and facts:

- (a) The name and business address of the association.
- (b) The names and addresses of the officers of the association.

(c) The number of membership contracts in force at the commencement of the year and the number of memberships in good standing at the close of the year for which the statement is made. This provision is also applicable to each subgroup or class, if any, of the association.

(d) The number of death losses claimed; the number and total amount of death losses paid; the number of death claims compromised, denied or resisted, and reasons therefor.

(e) The number of assessments in the association and in each subgroup or class, if any; the amount collected in each such assessment; income to the benevolent association from all other sources; and all other fees, assessments, donations, of any kind or nature, except new membership fees from new members.

(f) The expenses actually incurred during the year; debts unpaid at the commencement of the year; debts and obligations of any kind (not including death losses actually paid) incurred during the year; debts unpaid at the close of the year; a breakdown of expenses to show the amount paid in salaries or commissions, office expense and other expenses, in those cases where members of the benevolent association are assessed for operating expenses of such association.

(g) Whether the association has complied with all of the provisions of sections 40-4913 and 40-4914 of this chapter.

(h) The information required by section 40-4913 of this chapter.

(2) Two (2) officers of the association shall attest under oath to the truth of the facts contained in the annual statement. At least one of such officers must have charge of making up the statement.

(3) A copy of the annual statement certified by the commissioner must be filed before the first day of April each year by the association in the office of the county clerk of the county in which the business office of the association is located.

History: En. Sec. 536, Ch. 286, L. 1959.

40-4917. Other provisions applicable. In addition to the provisions contained in this chapter, other chapters and provisions of this title shall apply to benevolent associations, to the extent applicable, as follows:

(1) Chapter 26 (scope of code).

(2) Chapter 27 (the commissioner of insurance).

(3) The following sections of chapter 28 (authorization of insurers and general requirements):

(a) Section 40-2801 (certificate of authority required—in general).

(b) Section 40-2805 (name of insurer).

(c) Section 40-2810 (management and affiliations).

(d) Section 40-2813 (continuance, expiration, reinstatement and amendment of certificate of authority).

(e) Section 40-2814 (mandatory revocation, suspension of certificate of authority).

(f) Section 40-2815 (suspension or revocation for violations and special grounds).

(g) Section 40-2816 (notice of suspension or revocation—effect upon agent's authority).

(h) Section 40-2817 (duration of suspension—insurer's obligations—reinstatement).

(i) Section 40-2818 (commissioner attorney for service of process).

(j) Section 40-2819 (serving process—time to plead).

(4) The following provisions of chapter 30 (assets and liabilities):

(a) Section 40-3001 ("assets" defined).

(b) Section 40-3003 (assets not allowed).

(5) Section 40-3133 (prohibited investments).

(6) Chapter 35 (trade practices and frauds).

(7) Chapter 37 (the insurance contract).

(8) The following sections of chapter 47 (organization and corporate procedures of domestic stock and mutual insurers):

(a) Section 40-4723 (prohibited pecuniary interest of officials).

(b) Section 40-4725 (home office and records—penalty for unlawful removal of records).

(c) Section 40-4726 (vouchers for expenditures).

(d) Section 40-4749 (mutual member's share of assets on liquidation).

(e) Section 40-4750 (extinguishment of unused corporate charters).

(9) Chapter 51 (rehabilitations and liquidations).

History: En. Sec. 537, Ch. 286, L. 1959.

DECISIONS UNDER FORMER LAW

Ambiguities in Contract

The rule in litigation concerning insurance policies that any ambiguity in the policy shall be resolved against the insurer since the latter is responsible for the form of the contract applied to contracts between mutual death benefit societies and their members. *McDonald v. Northern Benefit Association*, 113 M 595, 605, 131 P 2d 479.

equivalent to a false representation that the fact does not exist. *McDonald v. Northern Benefit Association*, 113 M 595, 606, 131 P 2d 479.

Concealment Amounting to Actual Fraud

An applicant for membership in a mutual death benefit association who intentionally concealed material facts in his application, or made false representations with reference to them, intending to mislead the association, was guilty of actual fraud which, at the option of the latter, voided the certificate of membership, the concealment of a material fact being

False Answers in Application

In an action to recover on a death benefit certificate issued by a mutual association, operating under former chapter 14, which, though depending upon assessments on its members was not an assessment life insurance company under former chapter 20, nor a fraternal benefit society as defined under former chapter 21, resisted on the ground of falsity of decedent's answers in his application for membership as to freedom from disease and consultation of physicians, etc., under the facts presented plaintiff was not entitled to prevail. *McDonald v. Northern Benefit Association*, 113 M 595, 598, 131 P 2d 479.

CHAPTER 50

RECIPROCAL INSURERS

- Section 40-5001. "Reciprocal" insurance defined.
- 40-5002. "Reciprocal insurer" defined.
- 40-5003. Scope of chapter—existing insurers.
- 40-5004. Insuring powers of reciprocals.
- 40-5005. Name, suits.
- 40-5006. Attorney.
- 40-5007. Surplus funds required.
- 40-5008. Organization of reciprocal insurer.
- 40-5009. Certificate of authority.

- 40-5010. Power of attorney.
- 40-5011. Modifications.
- 40-5012. Attorney's bond.
- 40-5013. Action on bond.
- 40-5014. Annual statement.
- 40-5015. Contributions to insurer.
- 40-5016. Financial condition—method of determining.
- 40-5017. Who may be subscribers.
- 40-5018. Subscribers' advisory committee.
- 40-5019. Subscribers' liability.
- 40-5020. Subscribers' liability on judgment.
- 40-5021. Assessments.
- 40-5022. Time limit for assessments.
- 40-5023. Aggregate liability.
- 40-5024. Nonassessable policies.
- 40-5025. Distribution of savings.
- 40-5026. Subscribers' share in assets.
- 40-5027. Merger or conversion.
- 40-5028. Impaired reciprocals.

40-5001. "Reciprocal" insurance defined. "Reciprocal" insurance is that resulting from an interexchange among persons, known as "subscribers," of reciprocal agreements of indemnity, the interexchange being effectuated through an "attorney-in-fact" common to all such persons.

History: En. Sec. 538, Ch. 286, L. 1959. 29 Am. Jur. 511, Insurance, §§ 102 et seq.

Collateral References

Insurance—12½. Reciprocal or interinsurance. 94 ALR 836.
46 C.J.S. Insurance § 1410.

40-5002. "Reciprocal insurer" defined. A "reciprocal insurer" means an unincorporated aggregation of subscribers operating individually and collectively through an attorney-in-fact to provide reciprocal insurance among themselves.

History: En. Sec. 539, Ch. 286, L. 1959.

40-5003. Scope of chapter—existing insurers. (1) All authorized reciprocal insurers shall be governed by those sections of this chapter not expressly made applicable to domestic reciprocals.

(2) Existing authorized reciprocal insurers shall after the effective date of this code comply with the provisions of this chapter, and shall make such amendments to their subscribers' agreement, power of attorney, policies and other documents and accounts and perform such other acts as may be required for such compliance.

History: En. Sec. 540, Ch. 286, L. 1959.

40-5004. Insuring powers of reciprocals. (1) A reciprocal insurer may, upon qualifying therefor as provided for by this code, transact any kind or kinds of insurance defined by this code, other than life or title insurances.

(2) Such an insurer may purchase reinsurance, and may grant reinsurance as to any kind of insurance it is authorized to transact.

History: En. Sec. 541, Ch. 286, L. 1959.

40-5005. Name, suits. A reciprocal insurer shall: (1) Have and use a business name. The name shall include the word "reciprocal," or "inter-

insurer," or "interinsurance," or "exchange," or "underwriters," or "underwriting."

(2) Sue and be sued in its own name.

History: En. Sec. 542, Ch. 286, L. 1959.

40-5006. Attorney. (1) "Attorney," as used in this chapter refers to the attorney-in-fact of a reciprocal insurer. The attorney may be an individual, firm or corporation.

(2) The attorney of a foreign or alien reciprocal insurer, which insurer is duly authorized to transact insurance in this state, shall not, by virtue of discharge of its duties as such attorney with respect to the insurer's transactions in this state, be thereby deemed to be doing business in this state within the meaning of any laws of this state applying to foreign firms or corporations.

History: En. Sec. 543, Ch. 286, L. 1959.

40-5007. Surplus funds required. (1) A domestic reciprocal insurer hereunder formed, if it has otherwise complied with the applicable provisions of this code, may be authorized to transact insurance if it has and thereafter maintains surplus funds as follows:

(a) To transact property insurance, surplus funds of not less than two hundred thousand dollars (\$200,000);

(b) To transact casualty insurance, (other than workmen's compensation) surplus funds of not less than two hundred thousand dollars (\$200,000).

(2) In addition to surplus required to be maintained under subsection (1) above, the insurer shall have, when first so authorized, expendable surplus in amount as required of a like foreign reciprocal insurer under section 40-2808.

(3) A domestic reciprocal insurer may be authorized to transact additional kinds of insurance if it has otherwise complied with the provisions of this code therefor and possesses and so maintains surplus funds in amount equal to the minimum capital stock required of a stock insurer for authority to transact a like combination of kinds of insurance.

History: En. Sec. 544, Ch. 286, L. 1959.

40-5008. Organization of reciprocal insurer. (1) Twenty-five (25) or more persons domiciled in this state may organize a domestic reciprocal insurer and make application to the commissioner for a certificate of authority to transact insurance.

(2) The proposed attorney shall fulfill the requirements of and shall execute and file with the commissioner when applying for a certificate of authority, a declaration setting forth:

(a) The name of the insurer;

(b) The location of the insurer's principal office, which shall be the same as that of the attorney and shall be maintained within this state;

(c) The kinds of insurance proposed to be transacted;

(d) The names and addresses of the original subscribers;

(e) The designation and appointment of the proposed attorney and a copy of the power of attorney;

(f) The names and addresses of the officers and directors of the attorney, if a corporation, or its members, if a firm;

(g) The powers of the subscribers' advisory committee; and the names and terms of office of the members thereof;

(h) That all moneys paid to the reciprocal [insurer] shall, after deducting therefrom any sum payable to the attorney, be held in the name of the insurer and for the purposes specified in the subscribers' agreement;

(i) A copy of the subscribers' agreement;

(j) A statement that each of the original subscribers has in good faith applied for insurance of a kind proposed to be transacted, and that the insurer has received from each such subscriber the full premium or premium deposit required for the policy applied for, for a term of not less than six (6) months at an adequate rate theretofore filed with and approved by the commissioner;

(k) A statement of the financial condition of the insurer, a schedule of its assets, and a statement that the surplus as required by section 40-5007 is on hand; and

(l) A copy of each policy, endorsement and application form it then proposes to issue or use.

Such declaration shall be acknowledged by the attorney in the manner required for the acknowledgment of deeds.

History: En. Sec. 545, Ch. 286, L. 1959.

Compiler's Note

The bracketed word "insurer" was added by the compiler.

40-5009. Certificate of authority. (1) The certificate of authority of a reciprocal insurer shall be issued to its attorney in the name of the insurer.

(2) The commissioner may refuse, suspend or revoke the certificate of authority, in addition to other grounds therefor, for failure of the attorney to comply with any provision of this code.

History: En. Sec. 546, Ch. 286, L. 1959.

40-5010. Power of attorney. (1) The rights and powers of the attorney of a reciprocal insurer shall be as provided in the power of attorney given it by the subscribers.

(2) The power of attorney must set forth:

(a) The powers of the attorney;

(b) That the attorney is empowered to accept service of process on behalf of the insurer in actions against the insurer upon contracts exchanged;

(c) The general services to be performed by the attorney;

(d) The maximum amount to be deducted from advance premiums or deposits to be paid to the attorney and the general items of expense in addition to losses, to be paid by the insurer; and

(e) Except as to nonassessable policies, a provision for a contingent several liability of each subscriber in a specified amount which amount shall be not less than one (1) nor more than ten (10) times the premium or premium deposit stated in the policy.

(3) The power of attorney may:

- (a) Provide for the right of substitution of the attorney and revocation of the power of attorney and rights thereunder;
 - (b) Impose such restrictions upon the exercise of the power as are agreed upon by the subscribers;
 - (c) Provide for the exercise of any right reserved to the subscribers directly or through their advisory committee; and
 - (d) Contain other lawful provisions deemed advisable.
- (4) The terms of any power of attorney or agreement collateral thereto shall be reasonable and equitable, and no such power or agreement shall be used or be effective as to a domestic reciprocal insurer until approved by the commissioner.

History: En. Sec. 547, Ch. 286, L. 1959.

40-5011. Modifications. Modifications of the terms of the subscribers' agreement or of the power of attorney of a domestic reciprocal insurer shall be made jointly by the attorney and the subscribers' advisory committee. No such modification shall be effective retroactively, nor as to any insurance contract issued prior thereto.

History: En. Sec. 548, Ch. 286, L. 1959.

40-5012. Attorney's bond. (1) Concurrently with the filing of the declaration provided for in section 40-5008, the attorney of a domestic reciprocal insurer shall file with the commissioner a bond in favor of this state for the benefit of all persons damaged as a result of breach by the attorney of the conditions of his bond as set forth in subsection (2) hereof. The bond shall be executed by the attorney and by an authorized corporate surety, and shall be subject to the commissioner's approval.

(2) The bond shall be in the penal sum of twenty-five thousand dollars (\$25,000), aggregate in form, conditioned that the attorney will faithfully account for all moneys and other property of the insurer coming into his hands, and that he will not withdraw or appropriate to his own use from the funds of the insurer, any moneys or property to which he is not entitled under the power of attorney.

(3) The bond shall provide that it is not subject to cancellation unless thirty (30) days' advance notice in writing of cancellation is given both the attorney and the commissioner.

History: En. Sec. 549, Ch. 286, L. 1959.

40-5013. Action on bond. Action on the attorney's bond or to recover against any such deposit made in lieu thereof may be brought at any time by one or more subscribers suffering loss through a violation of its conditions, or by a receiver or liquidator of the insurer. Amounts recovered on the bond shall be deposited in and become part of the insurer's funds. The total aggregate liability of the surety shall be limited to the amount of the penalty of such bond.

History: En. Sec. 550, Ch. 286, L. 1959.

40-5014. Annual statement. (1) The annual statement of a reciprocal insurer shall be made and filed by its attorney.

(2) The statement shall be supplemented by such information as may be required by the commissioner relative to the affairs and transactions of the attorney in so far as they relate to the reciprocal insurer.

History: En. Sec. 551, Ch. 286, L. 1959.

40-5015. Contributions to insurer. The attorney or other parties may advance to a domestic reciprocal insurer upon reasonable terms such funds as it may require from time to time in its operations. Sums so advanced shall not be treated as a liability of the insurer, and, except upon liquidation of the insurer, shall not be withdrawn or repaid except out of the insurer's realized earned surplus in excess of its minimum required surplus. No such withdrawal or repayment shall be made without the advance approval of the commissioner. This section does not apply to bank loans or to loans for which security is given.

History: En. Sec. 552, Ch. 286, L. 1959.

40-5016. Financial condition—method of determining. In determining the financial condition of a reciprocal insurer the commissioner shall apply the following rules:

(1) He shall charge as liabilities the same reserves as are required of incorporated insurers issuing nonassessable policies on a reserve basis.

(2) The surplus deposits of subscriber shall be allowed as assets, except that any premium deposits delinquent for ninety (90) days shall first be charged against such surplus deposit.

(3) The surplus deposits of subscribers shall not be charged as a liability.

(4) All premium deposits delinquent less than ninety (90) days shall be allowed as assets.

(5) An assessment levied upon subscribers, and not collected, shall not be allowed as an asset.

(6) The contingent liability of subscribers shall not be allowed as an asset.

(7) The computation of reserves shall be based upon premium deposits other than membership fees and without any deduction for expenses and the compensation of the attorney.

History: En. Sec. 553, Ch. 286, L. 1959.

40-5017. Who may be subscribers. Individuals, partnerships, and corporations of this state may make application, enter into agreement for and hold policies or contracts in or with and be a subscriber of any domestic, foreign, or alien reciprocal insurer. Any corporation now or hereafter organized under the laws of this state shall, in addition to the rights, powers, and franchises specified in its articles of incorporation, have full power and authority as a subscriber to exchange insurance contracts through such reciprocal insurer. The right to exchange such contracts is hereby declared to be incidental to the purposes for which such corporations are organized and to be as fully granted as the rights and powers expressly conferred upon such corporations. Government or governmental agencies, state or political subdivisions thereof, boards, associations, estates, trustees or fiduciaries are authorized to exchange nonassessable reciprocal

interinsurance contracts with each other and with individuals, partnerships and corporations to the same extent that individuals, partnerships and corporations are herein authorized to exchange reciprocal interinsurance contracts. Any officer, representative, trustee, receiver, or legal representative of any such subscriber shall be recognized as acting for or on its behalf for the purpose of such contract but shall not be personally liable upon such contract by reason of acting in such representative capacity.

History: En. Sec. 554, Ch. 286, L. 1959.

40-5018. Subscribers' advisory committee. (1) The advisory committee of a domestic reciprocal insurer exercising the subscribers' rights shall be selected under such rules as the subscribers adopt.

(2) Not less than two-thirds of such committee shall be subscribers other than the attorney, or any person employed by, representing, or having a financial interest in the attorney.

(3) The committee shall:

(a) Supervise the finances of the insurer;

(b) Supervise the insurer's operations to such extent as to assure conformity with the subscribers' agreement and power of attorney;

(c) Procure the audit of the accounts and records of the insurer and of the attorney at the expense of the insurer; and

(d) Have such additional powers and functions as may be conferred by the subscribers' agreement.

History: En. Sec. 555, Ch. 286, L. 1959.

40-5019. Subscribers' liability. (1) The liability of each subscriber, other than as to a nonassessable policy, for the obligations of the reciprocal insurer shall be an individual, several and proportionate liability, and not joint.

(2) Except as to a nonassessable policy each subscriber shall have a contingent assessment liability, in the amount provided for in the power of attorney or in the subscribers' agreement, for payment of actual losses and expenses incurred while his policy was in force. Such contingent liability may be at the rate of not less than one (1) nor more than ten (10) times the premium or premium deposit stated in the policy, and the maximum aggregate thereof shall be computed in the manner set forth in section 40-5021 of this chapter.

(3) Each assessable policy issued by the insurer shall contain a statement of the contingent liability.

History: En. Sec. 556, Ch. 286, L. 1959.

40-5020. Subscribers' liability on judgment. (1) No action shall lie against any subscriber upon any obligation claimed against the insurer until a final judgment has been obtained against the insurer and remains unsatisfied for thirty days.

(2) Any such judgment shall be binding upon each subscriber only in such proportion as his interests may appear and in amount not exceeding his contingent liability, if any.

History: En. Sec. 557, Ch. 286, L. 1959.

40-5021. Assessments. (1) Assessments may from time to time be levied upon subscribers of a domestic reciprocal insurer liable therefor under the terms of their policies by the attorney upon approval in advance by the subscribers' advisory committee and the commissioner; or by the commissioner in liquidation of the insurer.

(2) Each subscriber's share of a deficiency for which an assessment is made, but not exceeding in any event his aggregate contingent liability as stated in accordance with section 40-5019 of this chapter, shall be computed by applying to the premium earned on the subscriber's policy or policies during the period to be covered by the assessment, the ratio of the total deficiency to the total premiums earned during such period upon all policies subject to the assessment.

(3) In computing the earned premiums for the purposes of this section, the gross premium received by the insurer for the policy shall be used as a base, deducting therefrom solely charges not recurring upon the renewal or extension of the policy.

(4) No subscriber shall have an offset against any assessment for which he is liable, on account of any claim for unearned premium or losses payable.

History: En. Sec. 558, Ch. 286, L. 1959.

40-5022. Time limit for assessments. Every subscriber of a domestic reciprocal insurer having contingent liability shall be liable for, and shall pay his share of any assessment, as computed and limited in accordance with this chapter, if:

(1) While his policy is in force or within one year after its termination, he is notified by either the attorney or the commissioner of his intentions to levy such assessment, or

(2) An order to show cause why a receiver, conservator, rehabilitator or liquidator of the insurer should not be appointed is issued while his policy is in force or within one year after its termination.

History: En. Sec. 559, Ch. 286, L. 1959.

40-5023. Aggregate liability. No one policy or subscriber as to such policy, shall be assessed or charged with an aggregate of contingent liability as to obligations incurred by a domestic reciprocal insurer in any one calendar year, in excess of the amount provided for in the power of attorney or in the subscribers' agreement, computed solely upon premium earned on such policy during that year.

History: En. Sec. 560, Ch. 286, L. 1959.

40-5024. Nonassessable policies. (1) If a reciprocal insurer has a surplus of assets over all liabilities at least equal to the minimum capital stock required of a domestic stock insurer authorized to transact like kinds of insurance, upon application of the attorney and as approved by the subscribers' advisory committee the commissioner shall issue his certificate authorizing the insurer to extinguish the contingent liability of subscribers under its policies then in force in this state, and to omit provisions imposing contingent liability in all policies delivered or issued for delivery in this state for so long as all such surplus remains unimpaired.

(2) Upon impairment of such surplus, the commissioner shall forthwith revoke the certificate. Such revocation shall not render subject to contingent liability any policy then in force and for the remainder of the period for which the premium has theretofore been paid; but after such revocation no policy shall be issued or renewed without providing for contingent assessment liability of the subscriber.

(3) The commissioner shall not authorize a domestic reciprocal insurer so to extinguish the contingent liability of any of its subscribers or in any of its policies to be issued, unless it qualifies to and does extinguish such liability of all its subscribers and in all such policies for all kinds of insurance transacted by it. Except, that if required by the laws of another state in which the insurer is transacting insurance as an authorized insurer, the insurer may issue policies providing for the contingent liability of such of its subscribers as may acquire such policies in such state, and need not extinguish the contingent liability applicable to policies theretofore in force in such state.

History: En. Sec. 561, Ch. 286, L. 1959.

40-5025. Distribution of savings. A reciprocal insurer may from time to time return to its subscribers any unused premiums, savings or credits accruing to their accounts. Any such distribution shall not unfairly discriminate between classes of risks, or policies, or between subscribers, but this shall not prevent retrospective rating, nor distribution on a retrospective plan, nor distribution varying as to classes of subscribers based on the experience of such subscribers.

History: En. Sec. 562, Ch. 286, L. 1959.

40-5026. Subscribers' share in assets. Upon the liquidation of a domestic reciprocal insurer, its assets remaining after discharge of its indebtedness and policy obligations, the return of any contributions of the attorney or other persons to its surplus made as provided in section 40-5015 of this chapter, and the return of any unused premium, savings, or credits then standing on subscribers' accounts, shall be distributed to its subscribers who were such within the twelve (12) months prior to the last termination of its certificate of authority, according to such reasonable formula as the commissioner may approve.

History: En. Sec. 563, Ch. 286, L. 1959.

40-5027. Merger or conversion. (1) A domestic reciprocal insurer upon affirmative vote of not less than two-thirds of its subscribers who vote on such merger pursuant to due notice and the approval of the commissioner of the terms therefor, may merge with another reciprocal insurer or be converted to a stock or mutual insurer.

(2) Such a stock or mutual insurer shall be subject to the same capital or surplus requirements and shall have the same rights as a like domestic insurer transacting like kinds of insurance.

(3) The commissioner shall not approve any plan for such merger or conversion which is inequitable to subscribers, or which, if for conversion to a stock insurer, does not give each subscriber preferential right to acquire

stock of the proposed insurer proportionate to his interest in the reciprocal insurer as determined in accordance with section 40-5026 of this chapter and a reasonable length of time within which to exercise such right.

History: En. Sec. 564, Ch. 286, L. 1959.

40-5028. Impaired reciprocals. (1) If the assets of a reciprocal insurer are at any time insufficient to discharge its liabilities, other than any liability on account of funds contributed by the attorney or others, and to maintain the required surplus, its attorney shall forthwith make up the deficiency or levy an assessment upon the subscribers for the amount needed to make up the deficiency; but subject to the limitation set forth in the power of attorney or policy.

(2) If the attorney fails to make up such deficiency or to make the assessment within thirty (30) days after the commissioner orders him to do so, or if the deficiency is not fully made up within sixty days after the date the assessment was made, the insurer shall be deemed insolvent and shall be proceeded against as authorized by this code.

(3) If liquidation of such an insurer is ordered, an assessment shall be levied upon the subscriber for such an amount, subject to limits as provided by this chapter, as the commissioner determines to be necessary to discharge all liabilities of the insurer, exclusive of any funds contributed by the attorney or other persons, but including the reasonable cost of the liquidation.

History: En. Sec. 565, Ch. 286, L. 1959.

CHAPTER 51

REHABILITATION AND LIQUIDATION

- Section 40-5101. **Definitions.**
 40-5102. Jurisdiction of delinquency proceedings—venue—exclusiveness of remedy—appeal.
 40-5103. Commencement of delinquency proceedings.
 40-5104. Injunctions.
 40-5105. Grounds for rehabilitation—domestic insurers.
 40-5106. Grounds for liquidation.
 40-5107. Grounds for conservation—foreign insurers.
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40-5101. Definitions. For the purpose of this chapter:

(1) "Impairment" or "insolvency." The capital of a stock insurer or the surplus of a mutual or reciprocal insurer, shall be deemed to be impaired and the insurer shall be deemed to be insolvent, when such insurer is not possessed of assets at least equal to all liabilities and required reserves together with its total issued and outstanding capital stock if a stock insurer, or the minimum surplus if a mutual or reciprocal insurer required by this code to be maintained for the kind or kinds of insurance it is then authorized to transact.

(2) "Insurer" means any person, firm, corporation, association or aggregation of persons doing an insurance business and subject to the insurance supervisory authority of, or to liquidation, rehabilitation, reorganization or conservation by the commissioner or the equivalent insurance supervisory official of another state.

(3) "Delinquency proceeding" means any proceeding commenced against an insurer pursuant to this chapter for the purpose of liquidating, rehabilitating, reorganizing or conserving such insurer.

(4) "State" means any state of the United States and also the District of Columbia, Alaska, Hawaii and Puerto Rico.

(5) "Foreign country" means territory not in any state.

(6) "Domiciliary state" means the state in which an insurer is incorporated or organized, or in the case of an insurer incorporated or organized in a foreign country, the state in which such insurer, having become authorized to do business in such state, has at the commencement of delinquency proceedings, the largest amount of its assets held in trust and assets held on deposit for the benefit of its policyholders or policyholders and creditors in the United States, and any such insurer is deemed to be domiciled in such state.

(7) "Ancillary state" means any state other than a domiciliary state.

(8) "Reciprocal state" means any state other than this state in which in substance and effect the provisions of the Uniform Insurers Liquidation Act, as defined in section 40-5121, are in force, including the provisions requiring that the commissioner of insurance or equivalent insurance supervisory official be the receiver of a delinquent insurer.

(9) "General assets" means all property, real, personal, or otherwise, not specifically mortgaged, pledged, deposited or otherwise encumbered for the security or benefit of specified persons or a limited class or classes of persons, and as to such specifically encumbered property the term includes all such property or its proceeds in excess of the amount necessary to discharge the sum or sums secured thereby. Assets held in trust and assets held on deposit for the security or benefit of all policyholders

or all policyholders and creditors in the United States shall be deemed general assets.

(10) "Preferred claim" means any claim with respect to which the law of the state or of the United States accords priority of payments from the general assets of the insurer.

(11) "Special deposit claim" means any claim secured by a deposit made pursuant to statute for the security or benefit of a limited class or classes of persons, but not including any general assets.

(12) "Secured claim" means any claim secured by mortgage, trust deed, pledge, deposit as security, escrow or otherwise, but not including special deposit claim or claims against general assets. The term also includes claims which more than four months prior to the commencement of delinquency proceedings in the state of the insurer's domicile have become liens upon specific assets by reason of judicial process.

(13) "Receiver" means receiver, liquidator, rehabilitator or conservator as the context may require.

History: En. Sec. 566, Ch. 286, L. 1959.

NOTE.—Uniform State Law. Sections 40-5101, 40-5103, 40-5104, and 40-5114 to 40-5121 constitute the "Uniform Insurers Liquidation Act" approved by the National Conference of Commissioners on Uniform State Laws in 1939 and adopted in the states of Colorado, Georgia, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, New Mexico, New York, North Carolina, Ohio, Oregon, Rhode Island, South Dakota, Utah and Washington.

Cross-Reference

Application of Montana Rules of Civil Procedure to this chapter, sec. 93-2711-7.

Collateral References

Insurance—41-51, 61-72.

44 C.J.S. Insurance §§ 119-135.

29 Am. Jur. 522, Insurance, §§ 114-133.

Validity, construction, and effect of Uniform Insurers Liquidation Act. 46 ALR 2d 1185.

40-5102. Jurisdiction of delinquency proceedings—venue—exclusiveness of remedy—appeal. (1) The district court is vested with exclusive original jurisdiction of delinquency proceedings under this chapter, and is authorized to make all necessary and proper orders to carry out the purposes of this chapter.

(2) The venue of delinquency proceedings against a domestic insurer shall be in the county of the insurer's principal place of business. The venue of such proceedings against foreign and alien insurer shall be in Lewis and Clark county.

(3) Delinquency proceedings pursuant to this chapter shall constitute the sole and exclusive method of liquidating, rehabilitating, reorganizing or conserving an insurer, and no court shall entertain a petition for the commencement of such proceedings unless the same has been filed in the name of the state on the relation of the commissioner.

(4) An appeal shall lie to the supreme court from an order granting or refusing rehabilitation, liquidation, or conservation, and from every other order in delinquency proceedings having the character of a final order as to the particular portion of the proceedings embraced therein.

History: En. Sec. 567, Ch. 286, L. 1959.

40-5103. Commencement of delinquency proceedings. The commissioner shall commence any such proceedings by application to the court for an order directing the insurer to show cause why the commissioner

should not have the relief prayed for. On the return of such order to show cause, and after a full hearing, the court shall either deny the application or grant the application, together with such other relief as the nature of the case and the interests of the policyholders, creditors, stockholders, members, subscribers or the public may require.

History: En. Sec. 568, Ch. 286, L. 1959.

40-5104. Injunctions. (1) Upon application by the commissioner for such an order to show cause, or at any time thereafter, the court may without notice issue an injunction restraining the insurer, its officers, directors, stockholders, members, subscribers, agents and all other persons from the transaction of its business or the waste or disposition of its property until the further order of the court.

(2) The court may at any time during a proceeding under this chapter issue such injunctions or orders as may be deemed necessary to prevent interference with the commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against the insurer or against its assets or any part thereof.

(3) Notwithstanding any other provision of law, no bond shall be required of the commissioner as a prerequisite for the issuance of any injunction or restraining order pursuant to this section.

History: En. Sec. 569, Ch. 286, L. 1959.

40-5105. Grounds for rehabilitation—domestic insurers. The commissioner may apply to the court for an order appointing him as receiver of and directing him to rehabilitate a domestic insurer upon one or more of the following grounds. That the insurer:

- (1) Is impaired or insolvent;
- (2) Has refused to submit any of its books, records, accounts or affairs to reasonable examination by the commissioner;
- (3) Has concealed or removed records or assets or otherwise violated section 40-4725;
- (4) Has failed to comply with an order of the commissioner to make good an impairment of capital or surplus or both;
- (5) Has transferred or attempted to transfer substantially its entire property or business, or has entered into any transaction the effect of which is to merge substantially its entire property or business in that of any other insurer without having first obtained the written approval of the commissioner;
- (6) Has willfully violated its charter or articles of incorporation or any law of this state;
- (7) Has an officer, director or manager who has refused to be examined under oath concerning its affairs;
- (8) Has been or is the subject of an application for the appointment of a receiver, trustee, custodian or sequestrator of the insurer or its property otherwise than pursuant to the provisions of this code, but only if such appointment has been made or is imminent and its effect is or would be to oust the courts of this state of jurisdiction hereunder;

(9) Has consented to such an order through a majority of its directors, stockholders, members or subscribers;

(10) Has failed to pay a final judgment rendered against it in this state upon any insurance contract issued or assumed by it, within thirty (30) days after the judgment became final or within thirty (30) days after the time for taking an appeal has expired, or within thirty (30) days after dismissal of an appeal before final termination, whichever date is the later.

History: En. Sec. 570, Ch. 286, L. 1959.

40-5106. Grounds for liquidation. The commissioner may apply to the court for an order appointing him as receiver (if his appointment as receiver shall not be then in effect) and directing him to liquidate the business of a domestic insurer or of the United States branch of an alien insurer having trustee assets in this state, regardless of whether or not there has been a prior order directing him to rehabilitate such insurer, upon any of the grounds specified in section 40-5105 of this chapter, or if such insurer:

(1) Has ceased transacting business for a period of one year, or

(2) Is an insolvent insurer and has commenced voluntary liquidation or dissolution, or attempts to commence or prosecute any action or proceeding to liquidate its business or affairs, or to dissolve its corporate charter, or to procure the appointment of a receiver, trustee, custodian or sequestrator under any law except this code.

History: En. Sec. 571, Ch. 286, L. 1959.

40-5107. Grounds for conservation—foreign insurers. The commissioner may apply to the court for an order appointing him as receiver or ancillary receiver, and directing him to conserve the assets within this state, of a foreign insurer upon any of the following grounds:

(1) Upon any of the grounds specified in sections 40-5105 or 40-5106 of this chapter, or

(2) Upon the ground that its property has been sequestered in its domiciliary sovereignty or in any other sovereignty.

History: En. Sec. 572, Ch. 286, L. 1959.

40-5108. Grounds for conservation—alien insurers. The commissioner may apply to the court for an order appointing him as receiver or ancillary receiver, and directing him to conserve the assets within this state, of any alien insurer upon any of the following grounds:

(1) Upon any of the grounds specified in sections 40-5105 or 40-5106 of this chapter.

(2) Upon the ground that the insurer has failed to comply, within the time designated by the commissioner, with an order made by him to make good an impairment of its trustee funds, or

(3) Upon the ground that the property of the insurer has been sequestered in its domiciliary sovereignty or elsewhere.

History: En. Sec. 573, Ch. 286, L. 1959.

40-5109. Grounds for ancillary liquidation—foreign insurers. The commissioner may apply to the court for an order appointing him as ancillary

receiver of and directing him to liquidate the business of a foreign insurer having assets, business or claims in this state upon the appointment in the domiciliary state of such insurer of a receiver, liquidator, conservator, rehabilitator or other officer by whatever name called for the purpose of liquidating the business of such insurer.

History: En. Sec. 574, Ch. 286, L. 1959.

40-5110. Order of rehabilitation—termination. (1) An order to rehabilitate a domestic insurer shall direct the commissioner forthwith to take possession of the property of the insurer and to conduct the business thereof, and to take such steps toward removal of the causes and conditions which have made rehabilitation necessary as the court may direct.

(2) If at any time the commissioner deems that further efforts to rehabilitate the insurer would be useless, he may apply to the court for an order of liquidation.

(3) The commissioner, or any interested person upon due notice to the commissioner, at any time may apply to the court for an order terminating the rehabilitation proceedings and permitting the insurer to resume possession of its property and the conduct of its business, but no such order shall be made or entered except when, after a hearing, the court has determined that the purposes of the proceeding have been fully accomplished.

History: En. Sec. 575, Ch. 286, L. 1959.

40-5111. Order of liquidation—domestic insurers. (1) An order to liquidate the business of a domestic insurer shall direct the commissioner forthwith to take possession of the property of the insurer, to liquidate its business, to deal with the insurer's property and business in his own name as commissioner of insurance or in the name of the insurer, as the court may direct, and to give notice to all creditors who may have claims against the insurer to present such claims.

(2) The commissioner may apply for and secure an order dissolving the corporate existence of a domestic insurer upon his application for an order of liquidation of such insurer or at any time after such order has been granted.

History: En. Sec. 576, Ch. 286, L. 1959.

40-5112. Order of liquidation—alien insurers. An order to liquidate the business of a United States branch of an alien insurer having trusteed assets in this state shall be in the same terms as those prescribed for domestic insurers, save and except only that the assets of the business of such United States branch shall be the only assets included therein.

History: En. Sec. 577, Ch. 286, L. 1959.

40-5113. Order of conservation or ancillary liquidation of foreign or alien insurers. (1) An order to conserve the assets of a foreign or alien insurer shall require the commissioner forthwith to take possession of the property of the insurer within this state and to conserve it, subject to the further direction of the court.

(2) An order to liquidate the assets in this state of a foreign insurer shall require the commissioner forthwith to take possession of the property of the insurer within this state and to liquidate it subject to the orders of

the court and with due regard to the rights and powers of the domiciliary receiver, as provided in this chapter.

History: En. Sec. 578, Ch. 286, L. 1959.

40-5114. Conduct of delinquency proceedings against domestic and alien insurers. (1) Whenever under this chapter a receiver is to be appointed in delinquency proceedings for a domestic or alien insurer, the court shall appoint the commissioner as such receiver. The court shall order the commissioner forthwith to take possession of the assets of the insurer and to administer the same under the orders of the court.

(2) As a domiciliary receiver, the commissioner shall be vested by operation of law with the title to all of the property, contracts and rights of action, and all of the books and records of the insurer, wherever located, as of the date of entry of the order directing him to rehabilitate or liquidate a domestic insurer or to liquidate the United States branch of an alien insurer domiciled in this state, and he shall have the right to recover the same and reduce the same to possession; except that ancillary receivers in reciprocal states shall have, as to assets located in their respective states, the rights and powers which are herein prescribed for ancillary receivers appointed in this state as to assets located in this state.

(3) The filing or recording of the order directing possession to be taken, or a certified copy thereof, in any office where instruments affecting title to property are required to be filed or recorded shall impart the same notice as would be imparted by a deed, bill of sale, or other evidence of title duly filed or recorded.

(4) The commissioner as domiciliary receiver shall be responsible for the proper administration of all assets coming into his possession or control. The court may at any time require a bond from him or his deputies if deemed desirable for the protection of such assets.

(5) Upon taking possession of the assets of an insurer, the domiciliary receiver shall, subject to the direction of the court, immediately proceed to conduct the business of the insurer or to take such steps as are authorized by this chapter for the purpose of rehabilitating, liquidating or conserving the affairs or assets of the insurer.

(6) In connection with delinquency proceedings, the commissioner may appoint one or more special deputy commissioners to act for him and he may employ such counsel, clerks and assistants as he deems necessary. The compensation of the special deputies, counsel, clerks or assistants and all expenses of taking possession of the insurer and of conducting the proceedings shall be fixed by the receiver, subject to the approval of the court, and shall be paid out of the funds or assets of the insurer. Within the limits of duties imposed upon them, special deputies shall possess all the powers given to and, in the exercise of those powers, shall be subject to all of the duties imposed upon the receiver with respect to such proceedings.

History: En. Sec. 579, Ch. 286, L. 1959. to participate in arbitration proceedings.
71 ALR 2d 1121.

Collateral References

Dissolved insurance corporation's power

40-5115. Conduct of delinquency proceedings against foreign insurers.

(1) Whenever under this chapter an ancillary receiver is to be appointed

in delinquency proceedings for an insurer not domiciled in this state, the court shall appoint the commissioner as ancillary receiver. The commissioner shall file a petition requesting the appointment on the grounds set forth in section 40-5109 of this chapter:

(a) If he finds that there are sufficient assets of the insurer located in this state to justify the appointment of an ancillary receiver, or

(b) If ten or more persons resident in this state having claims against such insurer file a petition with the commissioner requesting the appointment of such ancillary receiver.

(2) The domiciliary receiver for the purpose of liquidating an insurer domiciled in a reciprocal state shall be vested by operation of law with the title to all of the property, contracts and rights of action, and all of the books and records of the insurer located in this state, and he shall have the immediate right to recover balances due from local agents and to obtain possession of any books and records of the insurer found in this state. He shall also be entitled to recover the other assets of the insurer located in this state, except that upon the appointment of an ancillary receiver in this state, the ancillary receiver shall during the ancillary receivership proceedings have the sole right to recover such other assets. The ancillary receiver shall, as soon as practicable, liquidate from their respective securities those special deposit claims and secured claims which are proved and allowed in the ancillary proceedings in this state, and shall pay the necessary expenses of the proceedings. All remaining assets he shall promptly transfer to the domiciliary receiver. Subject to the foregoing provisions, the ancillary receiver and his deputies shall have the same powers and be subject to the same duties with respect to the administration of such assets as a receiver of an insurer domiciled in this state.

(3) The domiciliary receiver of an insurer domiciled in a reciprocal state may sue in this state to recover any assets of such insurer to which he may be entitled under the laws of this state.

History: En. Sec. 580, Ch. 286, L. 1959.

to participate in arbitration proceedings.
71 ALR 2d 1121.

Collateral References

Dissolved insurance corporation's power

40-5116. Claims of nonresidents against domestic insurers. (1) In a delinquency proceeding begun in this state against a domestic insurer, claimants residing in reciprocal states may file claims either with the ancillary receivers, if any, in their respective states, or with the domiciliary receiver. All such claims must be filed on or before the last date fixed for the filing of claims in the domiciliary delinquency proceedings.

(2) Controverted claims belonging to claimants residing in reciprocal states may either:

(a) Be proved in this state, or

(b) If ancillary proceedings have been commenced in such reciprocal states, may be proved in those proceedings. In the event a claimant elects to prove his claim in ancillary proceedings, if notice of the claim and opportunity to appear and be heard is afforded the domiciliary receiver of this state, as provided in section 40-5117 of this chapter with respect to ancillary proceedings in this state, the final allowance of such claim by

the courts in the ancillary state shall be accepted in this state as conclusive as to its amount and shall also be accepted as conclusive as to its priority, if any, against special deposits or other security located within the ancillary state.

History: En. Sec. 581, Ch. 286, L. 1959.

40-5117. Claims against foreign insurers. (1) In a delinquency proceeding in a reciprocal state against an insurer domiciled in that state, claimants against such insurer who reside within this state may file claims either with the ancillary receiver, if any, appointed in this state, or with the domiciliary receiver. All such claims must be filed on or before the last date fixed for the filing of claims in the domiciliary delinquency proceedings.

(2) Controverted claims belonging to claimants residing in this state may either:

(a) Be proved in the domiciliary state as provided by the law of that state, or

(b) If ancillary proceedings have been commenced in this state, be proved in those proceedings. In the event that any such claimant elects to prove his claim in this state, he shall file his claim with the ancillary receiver and shall give notice in writing to the receiver in the domiciliary state, either by registered mail or by personal service at least forty days prior to the date set for hearing. The notice shall contain a concise statement of the amount of the claim, the facts on which the claim is based, and the priorities asserted, if any. If the domiciliary receiver within thirty days after the giving of such notice shall give notice in writing to the ancillary receiver and to the claimant, either by registered mail or by personal service, of his intention to contest such claim, he shall be entitled to appear or to be represented in any proceeding in this state involving adjudication of the claim. The final allowance of the claim by the courts of this state shall be accepted as conclusive as to its amount and shall also be accepted as conclusive as to its priority, if any, against special deposits or other security located within this state.

History: En. Sec. 582, Ch. 286, L. 1959.

40-5118. Form of claim — notice — hearing. (1) All claims against an insurer against which delinquency proceedings have been begun shall set forth in reasonable detail the amount of the claim, or the basis upon which such amount can be ascertained, the facts upon which the claim is based, and the priorities asserted, if any. All such claims shall be verified by the affidavit of the claimant, or someone authorized to act on his behalf and having knowledge of the facts, and shall be supported by such documents as may be material thereto.

(2) All claims filed in this state shall be filed with the receiver, whether domiciliary or ancillary, in this state, on or before the last date of filing as specified in this chapter.

(3) Within ten days of the receipt of any claim, or within such further period as the court may, for good cause shown, fix, the receiver shall report the claim to the court, specifying in such report his recommendation with

respect to the action to be taken thereon. Upon receipt of such report, the court shall fix a time for hearing the claim and shall direct that the claimant or the receiver, as the court shall specify, shall give such notice as the court shall determine to such persons as shall appear to the court to be interested therein. All such notices shall specify the time and place of the hearing and shall concisely state the amount and nature of the claim, the priorities asserted, if any, and the recommendation of the receiver with reference thereto.

(4) At the hearing, all persons interested shall be entitled to appear and the court shall enter an order allowing, allowing in part, or disallowing the claim. Any such order shall be deemed to be an appealable order.

History: En. Sec. 583, Ch. 286, L. 1959.

40-5119. Priority of certain claims. (1) In a delinquency proceeding against an insurer domiciled in this state, claims owing to residents of ancillary states shall be preferred claims if like claims are preferred under the laws of this state. All such claims owing to residents or nonresidents shall be given equal priority of payment from general assets regardless of where such assets are located.

(2) In a delinquency proceeding against an insurer domiciled in a reciprocal state, claims owing to residents of this state shall be preferred if like claims are preferred by the laws of that state.

(3) The owners of special deposit claims against an insurer for which a receiver is appointed in this or any other state shall be given priority against their several special deposits in accordance with the provisions of the statutes governing the creation and maintenance of such deposits. If there is a deficiency in any such deposit so that the claims secured thereby are not fully discharged therefrom, the claimants may share in the general assets, but such sharing shall be deferred until general creditors, and also claimants against other special deposits who have received smaller percentages from their respective special deposits, have been paid percentages of their claims equal to the percentage paid from the special deposit.

(4) The owner of a secured claim against an insurer for which a receiver has been appointed in this or any other state may surrender his security and file his claim as a general creditor, or the claim may be discharged by resort to the security, in which case the deficiency, if any, shall be treated as a claim against the general assets of the insurer on the same basis as claims of unsecured creditors. If the amount of the deficiency has been adjudicated in ancillary proceedings as provided in this chapter, or if it has been adjudicated by a court of competent jurisdiction in proceedings in which the domiciliary receiver has had notice and opportunity to be heard, such amounts shall be conclusive; otherwise the amount shall be determined in the delinquency proceeding in the domiciliary state.

History: En. Sec. 584, Ch. 286, L. 1959.

40-5120. Attachment and garnishment of assets. During the pendency of delinquency proceedings in this or any reciprocal state, no action or proceeding in the nature of an attachment, garnishment or execution shall

be commenced or maintained in the courts of this state against the delinquent insurer or its assets. Any lien obtained for any such action or proceeding within four months prior to the commencement of any such delinquency proceeding or at any time thereafter shall be void as against any rights arising in such delinquency proceeding.

History: En. Sec. 585, Ch. 286, L. 1959.

40-5121. Uniform Insurers Liquidation Act. (1) Paragraphs (2) to (13) inclusive, of section 40-5101, together with sections 40-5103, 40-5104, and 40-5114 through 40-5120 constitute and may be referred to as the "Uniform Insurers Liquidation Act."

(2) The Uniform Insurers Liquidation Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it. To the extent that its provisions when applicable conflict with other provisions of this chapter, the provisions of such act shall control.

History: En. Sec. 586, Ch. 286, L. 1959.

40-5122. Deposit of moneys collected. The moneys collected by the commissioner in a proceeding under this chapter shall be from time to time deposited in one or more state or national banks, savings banks or trust companies, and in the case of the insolvency or voluntary or involuntary liquidation of any such depository which is an institution organized and supervised under the laws of this state, such deposits shall be entitled to priority of payment on an equality with any other priority given by the banking laws of this state. The commissioner may in his discretion deposit such moneys or any part thereof in a national bank or trust company as a trust fund.

History: En. Sec. 587, Ch. 286, L. 1959.

40-5123. Exemption from fees. The commissioner shall not be required to pay any fee to any public officer in this state for filing, recording, issuing a transcript or certificate or authenticating any paper or instrument pertaining to the exercise by the commissioner of any of the powers or duties conferred upon him under this chapter, whether or not such paper or instrument be executed by the commissioner or his deputies, employees or attorneys of record and whether or not it is connected with the commencement of any action or proceeding by or against the commissioner, or with the subsequent conduct of such action or proceeding.

History: En. Sec. 588, Ch. 286, L. 1959.

40-5124. Borrowing on pledge of assets. For the purpose of facilitating the rehabilitation, liquidation, conservation or dissolution of an insurer pursuant to this chapter, the commissioner may, subject to the approval of the court, borrow money and execute, acknowledge and deliver notes or other evidences of indebtedness therefor and secure the repayment of the same by the mortgage, pledge, assignment, transfer in trust, or hypothecation of any or all of the property, whether real, personal or mixed, of such insurer, and the commissioner subject to the approval of the court shall have power to take any and all other action necessary and proper

to consummate any such loan and to provide for the repayment thereof. The commissioner shall be under no obligation personally or in his official capacity to repay any loan made pursuant to this section.

History: En. Sec. 589, Ch. 286, L. 1959.

40-5125. Date rights fixed on liquidation. The rights and liabilities of the insurer and of its creditors, policyholders, stockholders, members, subscribers and all other persons interested in its estate shall, unless otherwise directed by the court, be fixed as of the date on which the order directing the liquidation of the insurer is filed in the office of the clerk of the court which made the order, subject to the provisions of this chapter with respect to the rights of claimants holding contingent claims.

History: En. Sec. 590, Ch. 286, L. 1959.

40-5126. Voidable transfers. (1) Any transfer of, or lien upon, the property of an insurer which is made or created within four months prior to the granting of an order to show cause under this chapter with the intent of giving to any creditor a preference or of enabling him to obtain a greater percentage of his debt than any other creditor of the same class and which is accepted by such creditor having reasonable cause to believe that such preference will occur, shall be voidable.

(2) Every director, officer, employee, stockholder, member, subscriber and any other person acting on behalf of such insurer who shall be concerned in any such act or deed and every person receiving thereby any property of such insurer or the benefit thereof shall be personally liable therefor and shall be bound to account to the commissioner.

(3) The commissioner as receiver in any proceeding under this chapter may avoid any transfer of or lien upon the property of an insurer which any creditor, stockholder, subscriber or member of such insurer might have avoided and may recover the property so transferred unless such person was a bona fide holder for value prior to the date of the entering of an order to show cause under this chapter. Such property or its value may be recovered from anyone who has received it except a bona fide holder for value as herein specified.

History: En. Sec. 591, Ch. 286, L. 1959.

40-5127. Priority of claims for compensation. (1) Compensation actually owing to employees other than officers of an insurer, for services rendered within three months prior to the commencement of a proceeding against the insurer under this chapter, but not exceeding five hundred dollars (\$500) for each employee, shall be paid prior to the payment of any other debt or claim, and in the discretion of the commissioner may be paid as soon as practicable after the proceeding has been commenced; except that at all times the commissioner shall reserve such funds as will in his opinion be sufficient for the expenses of administration.

(2) Such priority shall be in lieu of any other similar priority which may be authorized by law as to wages or compensation of such employees.

History: En. Sec. 592, Ch. 286, L. 1959.

40-5128. Offsets. (1) In all cases of mutual debts or mutual credits between the insurer and another person in connection with any action or

proceeding under this chapter, such credits and debts shall be set off and the balance only shall be allowed or paid, except as provided in subsection (2) below.

(2) No offset shall be allowed in favor of any such person where:

(a) The obligation of the insurer to such person would not at the date of the entry of any liquidation order or otherwise, as provided in section 40-5125, entitle him to share as a claimant in the assets of the insurer, or

(b) The obligation of the insurer to such person was purchased by or transferred to such person with a view of its being used as an offset, or

(c) The obligation of such person is to pay an assessment levied against the members of a mutual insurer, or against the subscribers of a reciprocal insurer, or is to pay a balance upon the subscription to the capital stock of a stock insurer.

History: En. Sec. 593, Ch. 286, L. 1959.

40-5129. Allowance of certain claims. (1) No contingent and unliquidated claim shall share in a distribution of the assets of an insurer which has been adjudicated to be insolvent by an order made pursuant to this chapter, except that such claim shall be considered, if properly presented, and may be allowed to share where:

(a) Such claim becomes absolute against the insurer on or before the last day for filing claims against the assets of such insurer, or

(b) There is a surplus and the liquidation is thereafter conducted upon the basis that such insurer is solvent.

(2) Where an insurer has been so adjudicated to be insolvent any person who has a cause of action against an insured of such insurer under a liability insurance policy issued by such insurer shall have the right to file a claim in the liquidation proceeding, regardless of the fact that such claim may be contingent, and such claim may be allowed:

(a) If it may be reasonably inferred from the proof presented upon such claim that such person would be able to obtain a judgment upon such cause of action against such insured, and

(b) If such person shall furnish suitable proof, unless the court for good cause shown shall otherwise direct, that no further valid claim against such insurer arising out of his cause of action other than those already presented can be made, and

(c) If the total liability of such insurer to all claimants arising out of the same act of its insured shall be no greater than its maximum liability would be were it not in liquidation.

(3) No judgment against such an insured taken after the date of entry of the liquidation order shall be considered in the liquidation proceedings as evidence of liability, or of the amount of damages, and no judgment against an insured taken by default, or by collusion prior to the entry of the liquidation order shall be considered as conclusive evidence in the liquidation proceedings, either of the liability of such insured to such person upon such cause of action or of the amount of damages to which such person is therein entitled.

(4) No claim of any secured claimant shall be allowed at a sum greater than the difference between the value of the claim without security and

the value of the security itself as of the date of the entry of the order of liquidation or such other date set by the court for determining rights and liabilities as provided in section 40-5125 unless the claimant shall surrender his security to the commissioner, in which event the claim shall be allowed in the full amount for which it is valued.

History: En. Sec. 594, Ch. 286, L. 1959.

40-5130. Time to file claims. (1) If upon the entry of an order of liquidation under this chapter or at any time thereafter during liquidation proceedings the insurer shall not be clearly solvent, the court shall, upon hearing after such notice it deems proper, make and enter an order adjudging the insurer to be insolvent.

(2) After the entry of the order of insolvency, regardless of any prior notice that may have been given to creditors, the commissioner shall notify all persons who may have claims against such insurer to file such claims with him, at a place and within the time specified in the notice, or that such claims shall be forever barred. The time specified in the notice shall be as fixed by the court for filing of claims and which shall be not less than six (6) months after the entry of the order of insolvency. The notice shall be given in such manner and for such reasonable period of time as may be ordered by the court.

History: En. Sec. 595, Ch. 286, L. 1959.

Collateral References

Applicability to limitation prescribed by policy of insurance, or by special stat-

utory provision in relation to insurance, of provisions of statute of limitations extending time or fixing time when action deemed commenced. 149 ALR 483.

40-5131. Report and petition for assessment. Within three years after the date of the entry of an order of rehabilitation or liquidation of a domestic mutual insurer or a domestic reciprocal insurer, the commissioner may make and file his report and petition to the court setting forth:

- (1) The reasonable value of the assets of the insurer;
- (2) The liabilities of the insurer to the extent thus far ascertained by the commissioner;
- (3) The aggregate amount of the assessment, if any, which the commissioner deems reasonably necessary to pay all claims, the costs and expenses of the collection of the assessments and the costs and expenses of the delinquency proceedings in full;
- (4) Any other information relative to the affairs or property of the insurer that the commissioner deems material.

History: En. Sec. 596, Ch. 286, L. 1959.

40-5132. Order and levy of assessment. (1) Upon the filing and reading of the report and petition provided for in section 40-5131, the court, ex parte, may order the commissioner to assess all members or subscribers of the insurer who may be subject to such an assessment, in such an aggregate amount as the court finds reasonably necessary to pay all valid claims as may be timely filed and proved in the delinquency proceedings, together with the costs and expenses of levying and collecting assessments and the costs and expenses of the delinquency proceedings in full. Any such order

shall require the commissioner to assess each such member or subscriber for his proportion of the aggregate assessment, according to such reasonable classification of such members or subscribers and formula as may be made by the commissioner and approved by the court.

(2) The court may order additional assessments upon the filing and reading of any amendment or supplement to the report and petition referred to in subsection (1) above, if such amendment or supplement is filed within three (3) years after the date of the entry of the order of rehabilitation or liquidation.

(3) After the entry of the order to levy and assess members or subscribers of an insurer referred to in (1) or (2) above, the commissioner shall levy and assess members or subscribers in accordance with the order.

(4) The total of all assessments against any member or subscriber with respect to any policy, whether levied pursuant to this chapter or pursuant to any other provision of this code, shall be for no greater amount than that specified in the policy or policies of the member or subscriber and as limited under this code, except as to any policy which was issued at a rate of premium below the minimum rate lawfully permitted for the risk insured, in which event the assessment against any such policyholder shall be upon the basis of the minimum rate for such risk.

(5) No assessment shall be levied against any member or subscriber with respect to any nonassessable policy issued in accordance with this code.

History: En. Sec. 597, Ch. 286, L. 1959.

40-5133. Assessment prima facie correct—notice—payment—proceedings to collect. (1) Any assessment of a subscriber or member of an insurer made by the commissioner pursuant to the order of court fixing the aggregate amount of the assessment against all members or subscribers and approving the classification and formula made by the commissioner under section 40-5132 shall be prima facie correct.

(2) Each member or subscriber shall be notified of the amount of assessment to be paid by him by written notice mailed to the address of the member or subscriber last of record with the insurer. Failure of the member or subscriber to receive the notice so mailed, within the time specified therein for the payment of the assessment or at all, shall be no defense in any proceeding to collect the assessment.

(3) If any such member or subscriber fails to pay the assessment within the period specified in the notice, which period shall not be less than twenty (20) days after mailing, the commissioner may obtain an order in the delinquency proceedings requiring the member or subscriber to show cause at a time and place fixed by the court why judgment should not be entered against such member or subscriber for the amount of the assessment together with all costs, and a copy of the order and a copy of the petition therefor shall be served upon the member or subscriber within the time and in the manner designated in the order.

(4) If the subscriber or member after due service of a copy of the order and petition referred to in (3) above is made upon him:

(a) Fails to appear at the time and place specified in the order, judgment shall be entered against him as prayed for in the petition; or

(b) Appears in the manner and form required by law in response to the order, the court shall hear and determine the matter and enter a judgment in accordance with its decision.

(5) The commissioner may collect any such assessment through any other lawful means.

History: En. Sec. 598, Ch. 286, L. 1959.

CHAPTER 52

TRUSTEED ASSETS OF ALIEN INSURERS

Section 40-5201.	Scope of chapter.
40-5202.	Required deposit of assets.
40-5203.	Existing trusts.
40-5204.	Purpose and duration.
40-5205.	Trust agreement—approval.
40-5206.	Authority to execute trust agreement.
40-5207.	Amendment of trust agreement.
40-5208.	Withdrawal of approval.
40-5209.	Title to trustee assets.
40-5210.	Assets kept separate.
40-5211.	Statement of trustee.
40-5212.	Examination of assets.
40-5213.	Withdrawal of assets.
40-5214.	Substitution of trustee.
40-5215.	Canadian insurers.

40-5201. Scope of chapter. This chapter applies to all alien insurers using Montana as a state of entry to transact insurance in the United States.

History: En. Sec. 599, Ch. 286, L. 1959.

44 C.J.S. Insurance § 81.

Collateral References

29 Am. Jur. 493, Insurance, § 74.

Insurance 15.

40-5202. Required deposit of assets. (1) An alien insurer may use Montana as a state of entry to transact insurance in the United States by making and maintaining in this state a deposit of assets in trust with a solvent bank or trust company approved by the commissioner.

(2) The deposit, together with other trust deposits of the insurer held in the United States for the same purpose, shall be in amount not less than the deposits required of an alien insurer under section 40-2809 (1), and shall consist of cash and/or securities of the same character and diversification as those eligible for the investment of the funds of domestic insurers under chapter 31 of this title.

(3) Such a deposit may be referred to as "trustee assets."

History: En. Sec. 600, Ch. 286, L. 1959.

40-5203. Existing trusts. All trusts of trustee assets heretofore created and now existing shall be continued under the instruments creating them, unless inconsistent with the provisions of this chapter.

History: En. Sec. 601, Ch. 286, L. 1959.

40-5204. Purpose and duration. The deposit required by section 40-5202 shall be for the benefit, security and protection of the policyholders, or policyholders and creditors, of the insurer in the United States. It

shall be maintained as long as there is outstanding any liability of the insurer arising out of its insurance transactions in the United States.

History: En. Sec. 602, Ch. 286, L. 1959.

40-5205. Trust agreement—approval. (1) The deposit referred to in section 40-5202 shall be made under a written trust agreement between the insurer and the trustee, consistent with the provisions of this chapter, and shall be authenticated in such form and manner as the commissioner may designate or approve.

(2) The agreement shall not be effective until filed with and approved in writing by the commissioner. The commissioner shall not approve any trust agreement found by him not to be in compliance with law, or the terms of which do not in fact provide reasonably adequate protection for the insurer's policyholders or policyholders and creditors in the United States.

History: En. Sec. 603, Ch. 286, L. 1959.

40-5206. Authority to execute trust agreement. An alien insurer using or proposing to use Montana as a state of entry to transact insurance in the United States, whether or not it is then authorized to transact insurance in this state, is authorized to make and execute any trust agreement required by this chapter.

History: En. Sec. 604, Ch. 286, L. 1959.

40-5207. Amendment of trust agreement. A trust agreement may be amended, but the amendment shall not be effective until filed with and approved in writing by the commissioner as being in compliance with this chapter.

History: En. Sec. 605, Ch. 286, L. 1959.

40-5208. Withdrawal of approval. The commissioner's approval of any trust agreement or of any amendment thereof may be withdrawn by the commissioner if he finds upon hearing, after notice thereof to the insurer and the trustee or trustees, that the requisites for such approval, as provided in this chapter, no longer exist.

History: En. Sec. 606, Ch. 286, L. 1959.

40-5209. Title to trustee assets. Title to the trustee assets is vested in the trustee or trustees and their successors for the purposes of the trust deposit, and the trust agreement shall so provide.

History: En. Sec. 607, Ch. 286, L. 1959.

40-5210. Assets kept separate. The trustee shall keep the trustee assets separate from other assets and shall maintain a record thereof sufficient to identify trustee assets at all times.

History: En. Sec. 608, Ch. 286, L. 1959.

40-5211. Statement of trustee. (1) The trustee of trustee assets shall, from time to time, file with the commissioner statements, in such form as he may designate and request in writing, certifying the character of such assets and the amounts thereof.

(2) If the trustee fails to file any such statement after request therefor and expiration of a reasonable time thereafter, the commissioner may suspend or revoke the certificate of authority of the insurer.

History: En. Sec. 609, Ch. 286, L. 1959.

40-5212. Examination of assets. The commissioner may examine trusted assets of any insurer at any time in accordance with the same conditions and procedures as govern the examination of insurers in general under chapter 27 of this title.

History: En. Sec. 610, Ch. 286, L. 1959.

40-5213. Withdrawal of assets. (1) The trust agreement shall provide, in substance, that no withdrawals of trusted assets shall be made by the insurer or permitted by the trustee without the written authorization or approval of the commissioner in advance thereof, except as follows:

(a) Any or all income, earnings, dividends or interest accumulations of the trusted assets may be paid over to the United States manager of the insurer upon request of the insurer or the manager.

(b) For substitution, coincidentally with such withdrawal, of other securities or assets of value at least equal in amount to those being withdrawn, if such substituted securities or assets are likewise such as are eligible for investment of the funds of domestic insurers under chapter 31 of this title, if such withdrawal is requested in writing by the insurer's United States manager pursuant to general or specific written authority previously given or delegated by the insurer's board of directors or other similar governing body, and a copy of such authority has been filed with the trustee.

(c) For the purpose of making deposits required by law in any state in which the insurer is or thereafter becomes an authorized insurer, for the protection of the insurer's policyholders or policyholders and creditors in such state or in the United States, if such withdrawal does not reduce the insurer's deposit in this state to an amount less than the minimum deposit required under section 40-2809 (1) (c) (i) and (ii). The trustee shall transfer any assets so withdrawn and in the amount so required to be deposited in the other state direct to the depository required to receive such deposit in such other state, as certified in writing by the public official having supervision of insurance in the other state.

(d) For the purpose of transferring the trusted assets to an official liquidator, conservator or rehabilitator pursuant to the order of a court of competent jurisdiction.

(2) The commissioner shall so authorize or approve withdrawal of only such assets as are in excess of the amount of assets required to be so held in trust under section 40-5202, or as may otherwise be consistent with the provisions of this chapter.

(3) If at any time the insurer becomes insolvent, or if its assets held in the United States are less in amount than as required under section 40-2809 (1) (c), upon determination thereof the commissioner shall in writing order the trustee to suspend the right of the insurer or any other person to withdraw assets as authorized under subdivisions (a), (b) and

(c) of subsection (1) above, and the trustee shall comply with such order and until the further order of the commissioner.

History: En. Sec. 611, Ch. 286, L. 1959.

40-5214. Substitution of trustee. (1) A new trustee or new trustees may be substituted for the original trustee or trustees of trusteed assets in the event of a vacancy or for other proper cause. Any such substitution shall be subject to the commissioner's approval.

(2) If the trustees of any trusteed assets heretofore created are individuals, and if the number of such trustees is reduced to less than three (3) by death, resignation or otherwise, the commissioner shall require that there be substituted for such trustees a bank or trust company in this state approved by him.

History: En. Sec. 612, Ch. 286, L. 1959.

40-5215. Canadian insurers. The provisions of this chapter applicable to a United States manager shall, in the case of insurers domiciled in Canada, be deemed to refer to the president, vice-president, secretary or treasurer of such a Canadian insurer.

History: En. Sec. 613, Ch. 286, L. 1959.

CHAPTER 53

FRATERNAL BENEFIT SOCIETIES

- Section 40-5301. "Fraternal benefit societies" defined.
 40-5302. "Lodge system" defined.
 40-5303. "Representative form of government" defined.
 40-5304. Chapter exclusive—applicability of other laws.
 40-5305. Exempted societies.
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- 40-5351. Discrimination and rebates.
- 40-5352. Service of process.
- 40-5353. Consolidations and mergers.
- 40-5354. Consolidations and mergers—effect.
- 40-5355. Conversion into mutual life insurer.
- 40-5356. Injunction—liquidation—receivership of domestic society.
- 40-5357. Injunction.
- 40-5358. Review.
- 40-5359. Other provisions applicable.

40-5301. "Fraternal benefit societies" defined. Any incorporated society, order or supreme lodge, without capital stock, including one exempted under the provisions of section 40-5305 (b) of this chapter whether incorporated or not, conducted solely for the benefit of its members and their beneficiaries and not for profit, operated on a lodge system with ritualistic form of work, having a representative form of government, and which makes provision for the payment of benefits in accordance with this chapter, is hereby declared to be a fraternal benefit society.

When used in this chapter the word "society," unless otherwise indicated, means fraternal benefit society.

History: En. Sec. 614, Ch. 286, L. 1959.

Collateral References

Insurance 687.
 46 C.J.S. Insurance § 1435.
 38 Am. Jur. 441, Mutual Benefit Societies, § 2.

Mutual companies and benefit or fraternal societies as insurance companies. 63 ALR 735.

Fraternity benefit societies as entitled to voluntary, or subject to involuntary, bankruptcy. 148 ALR 714.

40-5302. "Lodge system" defined. A society having a supreme legislative or governing body and subordinate lodges or branches by whatever name known, into which members are elected, initiated or admitted in accordance with its constitution, laws, ritual and rules, which subordinate lodges or branches are required by the laws of the society to hold regular meetings at least once in each month, shall be deemed to be operating on the lodge system.

History: En. Sec. 615, Ch. 286, L. 1959.

or other unit of benefit society. 94 ALR 639.

Collateral References

Expulsion or suspension of local lodge

40-5303. "Representative form of government" defined. A society shall be deemed to have a representative form of government when:

(1) It provides in its constitution or laws for a supreme legislative or governing body, composed of representatives elected either by the members or by delegates elected directly or indirectly by the members, together with such other members of such body as may be prescribed by the society's constitution and laws;

(2) The representatives elected constitute a majority in number and have not less than two-thirds of the votes nor less than the votes required to amend its constitution and laws;

(3) The meetings of the supreme legislative or governing body and the election of officers, representatives or delegates are held as often as once in four (4) calendar years;

(4) The society has a board of directors charged with the responsibility for managing its affairs in the interim between meetings of its supreme legislative or governing body, subject to control by such body and having powers and duties delegated to it in the constitution or laws of the society;

(5) Such board of directors is elected by the supreme legislative or governing body, except in case of filling a vacancy in the interim between meetings of such body;

(6) The officers are elected either by the supreme legislative or governing body or by the board of directors; and

(7) The members, officers, representatives or delegates shall not vote by proxy.

History: En. Sec. 616, Ch. 286, L. 1959.

46 C.J.S. Insurance § 1437.

Collateral References

38 Am. Jur. 441, Mutual Benefit Societies, § 2.

Insurance Ⓒ 693.

DECISIONS UNDER FORMER LAW

Change of Insurance Plan by Convention

Where fraternal mutual insurance society at convention changed from assessment to reserve plan, and beneficiaries of member who refused to join the reserve division or comply with the requirement calling for multiple assessments asserted

that the action of the convention was invalid because delegates didn't conform to certain requirements and hence their decedent was not in arrears and improperly suspended, assertion was not well made. *Willson v. Woodmen Of The World*, 104 M 31, 37, 64 P 2d 1064.

40-5304. Chapter exclusive—applicability of other laws. Except as herein provided, societies shall be governed by this chapter and shall be exempt from all other provisions of the insurance laws of this state, not only in governmental relations with the state, but for every other purpose. No law hereafter enacted shall apply to them, unless they be expressly designated therein.

History: En. Sec. 617, Ch. 286, L. 1959.

46 C.J.S. Insurance § 1436.

Collateral References

38 Am. Jur. 447, Mutual Benefit Societies, § 6.

Insurance Ⓒ 688.

40-5305. Exempted societies. (1) Nothing contained in this chapter shall be so construed as to affect or apply to:

(a) Grand or subordinate lodges of societies, orders or associations now doing business in this state which provide benefits exclusively through local or subordinate lodges;

(b) Orders, societies or associations which admit to membership only persons engaged in one or more crafts or hazardous occupations, in the same or similar lines of business, and the ladies' societies or ladies' auxiliaries to such orders, societies or associations;

(c) Domestic societies which limit their membership to employees of a particular city or town, designated firm, business house or corporation which provide for a death benefit of not more than four hundred dollars (\$400) or disability benefits of not more than three hundred fifty dollars (\$350) to any person in any one year, or both; or

(d) Domestic societies or associations of a purely religious, charitable or benevolent description, which provide for a death benefit of not more than four hundred dollars (\$400) or for disability benefits of not more than three hundred fifty dollars (\$350) to any one person in any one year, or both.

(2) Any such society or association described in clauses (c) or (d), above, which provides for death or disability benefits for which benefit certificates are issued, and any such society or association included in paragraph (d) which has more than one thousand (1,000) members, shall not be exempted from the provisions of this chapter but shall comply with all requirements thereof.

(3) No society which, by the provisions of this section, is exempt from the requirements of this chapter, except any society described in paragraph (b), above, shall give or allow, or promise to give or allow to any person any compensation for procuring new members.

(4) Every society which provides for benefits in case of death or disability resulting solely from accident, and which does not obligate itself to pay natural death or sick benefits shall have all of the privileges and be subject to all the applicable provisions and regulations of this chapter except that the provisions thereof relating to medical examination, valuations of benefit certificates, and incontestability, shall not apply to such society.

(5) The commissioner may require from any society or association, by examination or otherwise, such information as will enable him to determine whether such society or association is exempt from the provisions of this chapter.

(6) Societies, exempted under the provisions of this section, shall also be exempt from all other provisions of the insurance laws of this state.

History: En. Sec. 618, Ch. 286, L. 1959.

Collateral References

Insurance 689.

46 C.J.S. Insurance § 1436.

40-5306. Annual license. Societies which are now authorized to transact business in this state may continue such business until the first day of June next succeeding the effective date of this chapter. The authority of such societies and all societies hereafter licensed, may thereafter be renewed

annually, but in all cases to terminate on the first day of the succeeding June. However, a license so issued shall continue in full force and effect until the new license be issued or specifically refused. For each such license or renewal the society shall pay the commissioner ten dollars (\$10). A duly certified copy or duplicate of such license shall be prima facie evidence that the licensee is a fraternal benefit society within the meaning of this chapter.

History: En. Sec. 619, Ch. 286, L. 1959.

Compiler's Note

The date referred to in the first sentence above is June 1, 1961.

40-5307. Foreign or alien society—admission. (1) No foreign or alien society shall transact business in this state without a license issued by the commissioner. Any such society may be licensed to transact business in this state upon filing with the commissioner:

(a) A duly certified copy of its charter or articles of incorporation;
(b) A copy of its constitution and laws, certified by its secretary or corresponding officer;

(c) A power of attorney to the commissioner as prescribed in section 40-5352;

(d) A statement of its business under oath of its president and secretary or corresponding officers in a form prescribed by the commissioner, duly verified by an examination made by the supervising insurance official of its home state or other state, territory, province or country, satisfactory to the commissioner;

(e) A certificate from the proper official of its home state, territory, province or country that the society is legally incorporated and licensed to transact business therein;

(f) Copies of its certificate forms; and

(g) Such other information as he may deem necessary; and upon a showing that its assets are invested in accordance with the provisions of this chapter.

(2) Any foreign or alien society desiring admission to this state shall have the qualifications required of domestic societies organized under this chapter.

History: En. Sec. 620, Ch. 286, L. 1959.

Collateral References

Insurance—690.

46 C.J.S. Insurance § 1436.

23 Am. Jur. 203, Foreign Corporations, §§ 234 et seq.

Personal liability of agent in respect of policies of foreign insurance companies not authorized to do business in the state. 131 ALR 1079.

What constitutes doing business within state by foreign insurance corporation. 137 ALR 1128.

DECISIONS UNDER FORMER LAW

Power to Increase Rates

The decision of the supreme court of the domicile of a fraternal benefit association that the association had a right under its constitution and bylaws to increase its

rates and provide for multiple assessments, is binding upon citizens of other states who are members of the association. *Willson v. Woodmen Of The World*, 104 M 31, 40, 64 P 2d 1064.

40-5308. Suspension, revocation or refusal of license of foreign or alien society. (1) When the commissioner upon investigation finds that a foreign or alien society transacting or applying to transact business in this state:

- (a) Has exceeded its powers;
- (b) Has failed to comply with any of the provisions of this chapter;
- (c) Is not fulfilling its contracts in good faith; or
- (d) Is conducting its business fraudulently or in a manner hazardous to its members or creditors or the public;

He shall notify the society of his findings, state in writing the reasons for his dissatisfaction and require the society to show cause on a date named why its license should not be suspended, revoked or refused. If on such date the society does not present good and sufficient reason why its authority to do business in this state should not be suspended, revoked or refused, he may suspend or refuse the license of the society to do business in this state until satisfactory evidence is furnished to him that such suspension or refusal should be withdrawn or he may revoke the authority of the society to do business in this state.

(2) Nothing contained in this section shall be taken or construed as preventing any such society from continuing in good faith all contracts made in this state during the time such society was legally authorized to transact business herein.

History: En. Sec. 621, Ch. 286, L. 1959.

40-5309. Organization—incorporation. The organization of a society shall be governed as follows:

Seven (7) or more citizens of the United States, a majority of whom are citizens of this state, who desire to form a fraternal benefit society, may make, sign and acknowledge before some officer, competent to take acknowledgment of deeds, articles of incorporation, in which shall be stated:

(1) The proposed corporate name of the society, which shall not so closely resemble the name of any society or insurance company as to be misleading or confusing;

(2) The purposes for which it is being formed and the mode in which its corporate powers are to be exercised. Such purposes shall not include more liberal powers than are granted by this chapter, provided that any lawful social, intellectual, educational, charitable, benevolent, moral, fraternal or religious advantages may be set forth among the purposes of the society; and

(3) The names and residences of the incorporators and the names, residences and official titles of all the officers, trustees, directors, or other persons who are to have and exercise the general control of the management of the affairs and funds of the society for the first year or until the ensuing election at which all such officers shall be elected by the supreme legislative or governing body, which election shall be held not later than one year from the date of the issuance of the permanent certificate.

History: En. Sec. 622, Ch. 286, L. 1959.

Collateral References
Insurance 692.

46 C.J.S. Insurance § 1437.

38 Am. Jur. 449, Mutual Benefit Societies, §§ 8 et seq.

40-5310. Filing articles and documents—preliminary certificate. Such articles of incorporation, duly certified copies of the constitution, laws and rules, copies of all proposed forms of certificates, applications therefor,

and circulars to be issued by the society and a bond conditioned upon the return to applicants of the advanced payments if the organization is not completed within one year, shall be filed with the commissioner, who may require such further information as he deems necessary. The bond with sureties approved by the commissioner shall be in such amount, not less than five thousand dollars (\$5,000) nor more than twenty-five thousand dollars (\$25,000), as required by the commissioner. All documents filed are to be in the English language. If the purposes of the society conform to the requirements of this chapter and all provisions of the law have been complied with, the commissioner shall so certify, retain and file the articles of incorporation and furnish the incorporators a preliminary certificate authorizing the society to solicit members as hereinafter provided.

History: En. Sec. 623, Ch. 286, L. 1959.

40-5311. Time for completing organization. No preliminary certificate granted under the provisions of this section shall be valid after one year from its date or after such further period, not exceeding one year, as may be authorized by the commissioner upon cause shown, unless the five hundred (500) applicants hereinafter required have been secured and the organization has been completed as herein provided. The articles of incorporation and all other proceedings thereunder shall become null and void in one year from the date of the preliminary certificate, or at the expiration of the extended period, unless the society shall have completed its organization and received a certificate of authority to do business as hereinafter provided.

History: En. Sec. 624, Ch. 286, L. 1959.

40-5312. Initial solicitations and qualifications. Upon receipt of a preliminary certificate from the commissioner, the society may solicit members for the purpose of completing its organization, shall collect from each applicant the amount of not less than one regular monthly premium in accordance with its table of rates as provided by its constitution and laws, and shall issue to each such applicant a receipt for the amount so collected. No society shall incur any liability other than for the return of such advance premium, nor issue any certificate, nor pay, allow, or offer or promise to pay or allow, any death or disability benefit to any person until:

(1) Actual bona fide applications for death benefits have been secured aggregating at least five hundred thousand dollars (\$500,000) on not less than five hundred (500) lives;

(2) All such applicants for death benefits shall have furnished evidence of insurability satisfactory to the society;

(3) Certificates of examinations or acceptable declarations of insurability have been duly filed and approved by the chief medical examiner of the society;

(4) Ten (10) subordinate lodges or branches have been established into which the five hundred (500) applicants have been admitted;

(5) There has been submitted to the commissioner, under oath of the president or secretary, or corresponding officer of the society, a list

of such applicants, giving their names, addresses, date each was admitted, name and number of the subordinate branch of which each applicant is a member, amount of benefits to be granted and premiums therefor; and

(6) It shall have been shown to the commissioner, by sworn statement of the treasurer, or corresponding officer of such society, that at least five hundred (500) applicants have each paid in cash at least one regular monthly premium as herein provided, which premiums in the aggregate shall amount to at least twenty-five hundred dollars (\$2,500), all of which shall be credited to the fund or funds from which benefits are to be paid and no part of which may be used for expenses. Such advance premiums shall be held in trust during the period of organization and if the society has not qualified for a certificate of authority within one year, as herein provided, the premiums shall be returned to the applicants.

History: En. Sec. 625, Ch. 286, L. 1959.

Collateral References

Person to whom payment of insurance premium may be made or tendered so as to charge insurer. 85 ALR 749, 759.

40-5313. Certificate of compliance—certified copy as evidence. The commissioner may make such examination and require such further information as he deems advisable. Upon presentation of satisfactory evidence that the society has complied with all the provisions of law, he shall issue to the society a certificate to that effect and that the society is authorized to transact business pursuant to the provisions of this chapter. The certificate shall be prima facie evidence of the existence of the society at the date of such certificate. The commissioner shall cause a record of such certificate to be made. A certified copy of such record may be given in evidence with like effect as the original certificate.

History: En. Sec. 626, Ch. 286, L. 1959.

40-5314. Constitution and laws—general powers. (1) Every society shall have the power to adopt a constitution and laws for the government of the society, the admission of its members, the management of its affairs and the fixing and readjusting of the rates of its members from time to time. It shall have the power to change, alter, add to or amend such constitution and laws.

(2) A society shall have such other powers as are necessary and incidental to carrying into effect the objects and purposes of the society.

History: En. Sec. 627, Ch. 286, L. 1959.

40-5315. Corporate powers retained. Any incorporated society authorized to transact business in this state at the time this chapter becomes effective may thereafter exercise all the rights, powers and privileges prescribed in this chapter and in its charter or articles of incorporation as far as consistent with this chapter. A domestic society shall not be required to reincorporate.

History: En. Sec. 628, Ch. 286, L. 1959.

40-5316. Existing voluntary associations—may incorporate. (1) After one year from the effective date of this chapter, no unincorporated or vol-

untary association shall be permitted to transact business in this state as a fraternal benefit society.

(2) Any domestic voluntary association now authorized to transact business in this state may incorporate and shall receive from the commissioner a permanent certificate of incorporation as a fraternal benefit society when:

(a) It has completed its conversion to an incorporated society not later than one year from the effective date of this chapter;

(b) It has filed its articles of incorporation and has satisfied the other requirements described in sections 40-5309 through 40-5313; and

(c) The commissioner has made such examination and procured whatever additional information he deems advisable.

(3) Every voluntary association so incorporated shall incur the obligations and enjoy the benefits thereof the same as though originally incorporated, and such corporation shall be deemed a continuation of the original voluntary association. The officers thereof shall serve through their respective terms as provided in the original articles of association, but their successors shall be elected and serve as provided in its articles of incorporation. Incorporation of a voluntary association shall not affect existing suits, claims or contracts.

History: En. Sec. 629, Ch. 286, L. 1959.

40-5317. Articles of incorporation, constitution and laws—amendments—synopsis—certified copies as evidence. (1) A domestic society may amend its articles of incorporation, constitution or laws in accordance with the provisions thereof by action of its supreme legislative or governing body at any regular or special meeting thereof or, if its articles of incorporation, constitution or laws so provide, by referendum. Such referendum may be held in accordance with the provisions of its articles of incorporation, constitution or laws by the vote of the voting members of the society, by the vote of delegates or representatives of voting members or by the vote of local lodges or branches. No amendment submitted for adoption by referendum shall be adopted unless, within six (6) months from the date of submission thereof, a majority of all of the voting members of the society shall have signified their consent to such amendment by one of the methods herein specified.

(2) No amendment to the articles of incorporation, constitution or laws of any domestic society shall take effect unless approved by the commissioner, who shall approve such amendment if he finds it has been duly adopted and is not inconsistent with any requirement of the laws of this state or with the character, objects and purposes of the society. Unless the commissioner disapproves any such amendment within sixty (60) days after the filing of same, such amendment shall be considered approved. The approval or disapproval of the commissioner shall be in writing and mailed to the secretary or corresponding officer of the society at its principal office. In case he disapproves the amendment, the reasons therefor shall be stated in the written notice.

(3) Within ninety (90) days from the approval thereof by the commissioner, all such amendments, or a synopsis thereof, shall be furnished

by the society to all members either by mail or by publication in full in the official organ of the society. The affidavit of any officer of the society or of anyone authorized by it to mail any amendments or synopsis thereof, stating facts which show that same have been duly addressed and mailed, shall be prima facie evidence that such amendments or synopsis thereof, have been furnished the addressee.

(4) Every foreign or alien society authorized to do business in this state shall file with the commissioner a duly certified copy of all amendments of, or additions to, its articles of incorporation, constitution or laws within ninety (90) days after the enactment of same.

(5) Printed copies of the constitution or laws as amended, certified by the secretary or corresponding officer of the society shall be prima facie evidence of the legal adoption thereof.

History: En. Sec. 630, Ch. 286, L. 1959.

Collateral References

Insurance 693.

46 C.J.S. Insurance § 1438.

DECISIONS UNDER FORMER LAW

Justification for Change

Where insurance commissioners in several states advised fraternal insurance society that unless it was placed in a solvent condition and provided for an increase of rates or multiple assessments authorized under its constitution, it would be denied the right to do business, the society was justified in adopting a reserve plan with an option to members to remain on the assessment plan subject to multiple assessments. *Willson v. Woodmen Of The World*, 104 M 31, 43, 64 P 2d 1064.

Knowledge Chargeable to Members

Member of fraternal society is chargeable with knowledge that failure on his

part to pay multiple assessments called for by change in plan will result in suspension. *Willson v. Woodmen Of The World*, 104 M 31, 39, 64 P 2d 1064.

Refusal upon Change of Plan to Pay Multiple Assessments

Where fraternal mutual insurance society at convention changed from assessment to reserve plan but gave members an option to remain in assessment plan subject to multiple assessments, member who refused to join the reserve division or pay the multiple assessments was in arrears and properly suspended. *Willson v. Woodmen Of The World*, 104 M 31, 37, 64 P 2d 1064.

40-5318. Waiver. The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members shall have the power or authority to waive any of the provisions of the laws and constitution of the society. Such provision shall be binding on the society and every member and beneficiary of a member.

History: En. Sec. 631, Ch. 286, L. 1959.

Collateral References

Insurance 695.

46 C.J.S. Insurance § 1464.

40-5319. Location of office—place of meeting—records in English language. (1) The principal office of any domestic society shall be located in this state. The meetings of its supreme legislative or governing body may be held in any state, district, province or territory wherein such society has at least five (5) subordinate branches and all business transacted at such meetings shall be as valid in all respects as if such meetings were held in this state.

(2) The minutes of the proceedings of the supreme or governing body and of the board of directors or corresponding body of a society shall be in the English language.

History: En. Sec. 632, Ch. 286, L. 1959.

Collateral References

Insurance 692.

46 C.J.S. Insurance § 1437.

40-5320. Institutions. (1) It shall be lawful for a society to create, maintain and operate charitable, benevolent or educational institutions for the benefit of its members and their families and dependents and for the benefit of children insured by the society. For such purpose it may own, hold or lease personal property or real property located within or without this state, with necessary buildings thereon. Such property shall be reported in every annual statement but shall not be allowed as an admitted asset of such society.

(2) Maintenance, treatment and proper attendance in any such institution may be furnished free or a reasonable charge may be made therefor, but no such institution shall be operated for profit. The society shall maintain a separate accounting of any income and disbursements under this section and report them in its annual statement.

(3) No society shall own or operate funeral homes or undertaking establishments.

History: En. Sec. 633, Ch. 286, L. 1959.

40-5321. Qualifications for membership. A society may admit to benefit membership any person not less than fifteen (15) years of age, nearest birthday, who has furnished evidence of insurability acceptable to the society. Any such member who shall apply for additional benefits more than six (6) months after becoming a benefit member shall furnish additional evidence of insurability acceptable to the society.

Any person admitted prior to attaining the full age of twenty-one (21) years shall be bound by the terms of the application and certificate and by all the laws and rules of the society and shall be entitled to all the rights and privileges of membership therein to the same extent as though the age of majority had been attained at the time of application. A society may also admit general or social members who shall have no voice or vote in the management of its insurance affairs.

History: En. Sec. 634, Ch. 286, L. 1959.

Collateral References

38 Am. Jur. 489, Mutual Benefit Societies, §§ 61 et seq.

Limit of liability of members of insurance associations. 10 ALR 750.

Right of member of society with benefits in nature of insurance to notice and hearing before suspension or expulsion. 27 ALR 1512.

Power of mutual benefit society to waive restrictions upon eligibility to membership. 28 ALR 93.

Validity, construction, and effect of by-law, statute, or other provision of life insurance contract which prevents payment to creditor of insured or beneficiary. 92 ALR 911.

Expulsion or suspension of local lodge or other unit of benefit society. 94 ALR 639.

40-5322. Member's share of deficiency. A society shall provide in its constitution or laws that if its reserves as to all or any class of certificates become impaired its board of directors or corresponding body may require that there shall be paid by the member to the society the amount of the

member's equitable proportion of such deficiency as ascertained by its board, and that if the payment be not made it shall stand as an indebtedness against the member's certificate and draw interest not to exceed five per cent (5%) per annum compounded annually.

History: En. Sec. 635, Ch. 286, L. 1959.

Set-off of loss under mutual insurance policy against premium or assessment. 31 ALR 1281.

Collateral References

Limit of liability of member of insurance association. 10 ALR 750.

40-5323. Benefits. (1) A society authorized to do business in this state may provide for the payment of:

- (a) Death benefits in any form;
- (b) Endowment benefits;
- (c) Annuity benefits;
- (d) Temporary or permanent disability benefits as a result of disease or accident;
- (e) Hospital, medical or nursing benefits due to sickness or bodily infirmity or accident; and
- (f) Monument or tombstone benefits to the memory of deceased members not exceeding in any case the sum of three hundred dollars (\$300).

(2) Such benefits may be provided on the lives of members or, upon application of a member, on the lives of a member's family, including the member, the member's spouse and minor children, in the same or separate certificates.

History: En. Sec. 636, Ch. 286, L. 1959.

46 C.J.S. Insurance § 1546.

Collateral References

38 Am. Jur. 525, Mutual Benefit Societies, §§ 116 et seq.

Insurance Ⓒ 791.

40-5324. Benefits on lives of children. (1) A society may provide for benefits on the lives of children under the minimum age for adult membership but not greater than twenty-one (21) years of age at time of application therefor, upon the application of some adult person, as its laws or rules may provide, which benefits shall be in accordance with the provisions of section 40-5323 of this chapter. A society may, at its option, organize and operate branches for such children. Membership and initiation in local lodges shall not be required of such children, nor shall they have a voice in the management of the society.

(2) A society shall have power to provide for the designation and changing of designation of beneficiaries in the certificates providing for such benefits and to provide in all other respects for the regulation, government and control of such certificates and all rights, obligations and liabilities incident thereto and connected therewith.

History: En. Sec. 637, Ch. 286, L. 1959.

40-5325. Nonforfeiture benefits, cash surrender values, certificate loans and other options. (1) A society may grant paid-up nonforfeiture benefits, cash surrender values, certificate loans and such other options as its laws may permit. As to certificates issued on and after the effective date of this chapter, a society shall grant at least one paid-up nonforfeiture

benefit, except in the case of pure endowment, annuity or reversionary annuity contracts, reducing term insurance contracts or contracts of term insurance of uniform amount of fifteen (15) years or less expiring before age sixty-six (66).

(2) In the case of certificates other than those for which reserves are computed on the commissioner's 1941 standard ordinary mortality table or the 1941 standard industrial table, the value of every paid-up nonforfeiture benefit and the amount of any cash surrender value, loan or other option granted shall not be less than the excess, if any, of (a) over (b) as follows:

(a) The reserve under the certificate determined on the basis specified in the certificates; and

(b) The sum of any indebtedness to the society on the certificate, including interest due and accrued, and a surrendered charge equal to two and one-half per cent ($2\frac{1}{2}\%$) of the face amount of the certificate, which, in the case of insurance on the lives of children, shall be the ultimate face amount of the certificate, if death benefits provided therein are graded.

(3) However, in the case of certificates issued on a substandard basis or in the case of certificates, the reserves for which are computed upon the American men ultimate table of mortality, the term of any extended insurance benefit granted including accompanying pure endowment, if any, may be computed upon the rates of mortality not greater than one hundred thirty per cent (130%) of those shown by the mortality table specified in the certificate for the computation of the reserve.

(4) In the case of certificates for which reserves are computed on the commissioner's 1941 standard ordinary mortality table or the 1941 standard industrial table, every paid-up nonforfeiture benefit and the amount of any cash surrender value, loan or other option granted shall not be less than the corresponding amount ascertained in accordance with the provisions of the laws of this state applicable to life insurers issuing policies containing like insurance benefits based upon such tables.

History: En. Sec. 638, Ch. 286, L. 1959.

40-5326. Beneficiaries. (1) The member shall have the right at all times to change the beneficiary or beneficiaries in accordance with the constitution, laws or rules of the society. Every society by its constitution, laws or rules may limit the scope of beneficiaries and shall provide that no beneficiary shall have or obtain any vested interest in the proceeds of any certificate until the certificate has become due and payable in conformity with the provisions of the insurance contract.

(2) A society may make provision for the payment of funeral benefits to the extent of such portion of any payment under a certificate as might reasonably appear to be due to any person equitably entitled thereto by reason of having incurred expense occasioned by the burial of the member, but the portion so paid shall not exceed the sum of five hundred dollars (\$500).

If, at the death of any member, there is no lawful beneficiary to whom the insurance benefits are payable, the amount of such benefits, except

to the extent that funeral benefits may be paid as hereinbefore provided, shall be payable to the personal representative of the deceased member.

History: En. Sec. 639, Ch. 286, L. 1959.

Collateral References

Insurance⊕770, 773, 780.
46 C.J.S. Insurance §§ 1549, 1558, 1566.
38 Am. Jur. 546, Mutual Benefit Soci-
eties, §§ 138 et seq.

Validity, construction, and effect of by-law, statute, or other provision of life contract which prevents payment of insured or beneficiary. 92 ALR 911.

DECISIONS UNDER FORMER LAW

Beneficiaries Not Favored by Law

Where the laws under which a fraternal life insurance society was organized, at the time a contract of insurance between it and a resident of this state was executed, did not exclude a sister-in-law from becoming beneficiary, the constitution of the society on the contrary providing that she could become such, and the insured after a second marriage changed his beneficiary from his wife to his sister-in-law under the former marriage, the latter was eligible to take so long as the relationship of brother-in-law and sister-in-law continued, even though now the laws did not include a sister-in-law in the favored class. *Styles v. Byrne*, 89 M 243, 252, 296 P 577.

Divorce

Where the constitution of a society and the bylaws of a subordinate lodge provided that where husband or wife is designated as beneficiary, divorce should render either ineligible as beneficiary and annul the designation, the husband's designation as beneficiary lapses upon the happening of the divorce, but the insurance is not thereby invalidated as to others who may be eligible to receive payment. *Nitsche v. Security Benefit Assn. et al.*, 78 M 532, 546, 255 P 1052.

False Designation of Beneficiary

A statement made in an application for life insurance in an old line company of

relationship of beneficiary is regarded as merely for identification as a description of the person; a false statement in respect of fraternal insurance societies is not a breach of warranty and does not vitiate the certificate on the ground of fraud. *Stevens v. Woodmen Of The World*, 105 M 121, 138, 71 P 2d 898.

Where a woman claimant under a fraternal benefit certificate had been falsely or fraudulently designated as beneficiary as the cousin of the insured, but years later became his common-law wife, she, though admittedly incapable of taking as deceased's cousin, as wife occupied a degree of relationship under this section entitling her to take as such. *Stevens v. Woodmen Of The World*, 105 M 121, 140, 71 P 2d 898.

Ineligible Beneficiary

One who did not occupy some one of the degrees of relationship with the insured enumerated in former section 40-2107 could not become a beneficiary under a certificate issued by a fraternal benefit society. *Stevens v. Woodmen Of The World*, 105 M 121, 129, 71 P 2d 898.

An attempt to name as a beneficiary in a life insurance policy a person who was not qualified by law to become such did not ipso facto invalidate the entire policy or render it void ab initio. *Stevens v. Woodmen Of The World*, 105 M 121, 139, 71 P 2d 898.

40-5327. Benefits not attachable. No money or other benefit, charity, relief or aid to be paid, provided or rendered by any society, shall be liable to attachment, garnishment or other process, or to be seized, taken, appropriated or applied by any legal or equitable process or operation of law to pay any debt or liability of a member or beneficiary, or any other person who may have a right thereunder, either before or after payment by the society.

History: En. Sec. 640, Ch. 286, L. 1959.

Collateral References

Exemptions⊕50(2); Insurance⊕797.
35 C.J.S. Exemptions § 39; 46 C.J.S. In-
surance § 1597.

Constitutionality of statute exempting proceeds of life or benefit insurance. 1 ALR 757.

40-5328. No personal liability. The officers and members of the supreme, grand or any subordinate body of a society shall not be personally liable for payment of any benefits provided by a society.

History: En. Sec. 641, Ch. 286, L. 1959.

Collateral References

Insurance 798.

46 C.J.S. Insurance § 1600.

40-5329. The contract. (1) Every society authorized to do business in this state shall issue to each benefit member a certificate specifying the amount of benefits provided thereby. The certificate, together with any riders or endorsements attached thereto, the charter or articles of incorporation, the constitution and laws of the society, the application for membership, and declaration of insurability, if any, signed by the applicant, and all amendments to each thereof, shall constitute the agreement, as of the date of issuance, between the society and the member, and the certificate shall so state. A copy of the application for membership and of the declaration of insurability, if any, shall be endorsed upon or attached to the certificate.

(2) All statements purporting to be made by the member shall be representations and not warranties. Any waiver of this provision shall be void.

(3) Any changes, additions or amendments to the charter or articles of incorporation, constitution or laws duly made or enacted subsequent to the issuance of the certificate, shall bind the member and the beneficiaries, and shall govern and control the agreement in all respects the same as though such changes, additions or amendments had been made prior to and were in force at the time of the application for membership, except that no change, addition, or amendment shall destroy or diminish benefits which the society contracted to give the member as of the date of issuance.

(4) Copies of any of the documents mentioned in this section, certified by the secretary or corresponding officer of the society, shall be received in evidence of the terms and conditions thereof.

History: En. Sec. 642, Ch. 286, L. 1959.

38 Am. Jur. 525, Mutual Benefit Societies, §§ 115 et seq.

Collateral References

Insurance 714.

46 C.J.S. Insurance § 1459.

Meaning of phrase "in good standing" employed in contract of mutual benefit association with member. 23 ALR 340.

DECISIONS UNDER FORMER LAW

Change of Rates

Where insurance commissioners in several states advised fraternal insurance society that unless it was placed in a solvent condition and provided for an increase of rates or multiple assessments authorized under its constitution, it would be denied the right to do business, raising of rates was justified. *Willson v. Woodmen Of The World*, 104 M 31, 43, 64 P 2d 1064.

Elements of Contract

In an action on a certificate of life insurance issued by a fraternal insurance society, the certificate together with the

application and the provisions of the constitution and bylaws of the society applicable constitute the contract between the parties. *Osborne v. Supreme Lodge etc. Ins. Dept.*, 69 M 361, 366, 222 P 456.

Fraudulent Application

Where there was actual fraud on the part of the decedent in securing membership in a mutual benefit association by reason of false statements made by him in his application therefor, which prevented the membership from ever becoming effective, the association was not, under former section 40-514, required to repay to

the beneficiary a certificate fee of \$5 and several monthly assessments of \$1 each paid by decedent prior to his death, as it would have been under that section in case of defaults other than those caused by fraud. *McDonald v. Northern Benefit Association*, 113 M 595, 609, 131 P 2d 479.

Knowledge Chargeable to Member

Member of fraternal society was chargeable with knowledge that failure on his part to pay multiple assessments will result in suspension, under the facts presented. *Willson v. Woodmen Of The World*, 104 M 31, 39, 64 P 2d 1064.

Modification of Contract

The certificate of life insurance issued by a mutual benefit association working under a lodge system, with the original application, the report of the medical examiner and the constitution and bylaws of the society constitute the contract between it and its member, which contract can be modified only by a subsequent agreement in writing or by executed oral agreement between the original parties thereto. *Nitsche v. Security Benefit Assn. et al.*, 78 M 532, 546, 255 P 1052.

40-5330. Standard provisions. (1) After one year from the effective date of this chapter, no life benefit certificate shall be delivered or issued for delivery in this state unless a copy of the form has been filed with the commissioner.

(2) The certificate shall contain in substance the following standard provisions or, in lieu thereof, provisions which are more favorable to the member:

(a) Title on the face and filing page of the certificate clearly and correctly describing its form;

(b) A provision stating the amount of rates, premiums or other required contributions, by whatever name known, which are payable by the insured under the certificate;

(c) A provision that the member is entitled to a grace period of not less than a full month (or thirty (30) days at the option of the society) in which the payment of any premium after the first, may be made. During such grace period the certificate shall continue in full force, but in case the certificate becomes a claim during the grace period before the overdue payment is made, the amount of such overdue payment or payments may be deducted in any settlement under the certificate;

(d) A provision that the member shall be entitled to have the certificate reinstated at any time within three (3) years from the due date of the premium in default, unless the certificate has been completely terminated through the application of a nonforfeiture benefit, cash surrender value or certificate loan, upon the production of evidence of insurability satisfactory to the society and the payment of all overdue premiums and any other indebtedness to the society upon the certificate, together with interest on such premiums and such indebtedness, if any, at a rate not exceeding six per cent (6%) per annum compounded annually;

(e) Except in the case of pure endowment, annuity or reversionary annuity contracts, reducing term insurance contracts, or contracts of term insurance of uniform amount of fifteen (15) years or less expiring before age sixty-six (66), a provision that, in the event of default in payment of any premium after three (3) full years' premiums have been paid or after premiums for a lesser period have been paid if the contract so provides, the society will grant, upon proper request not later than sixty (60) days after the due date of the premium in default, a paid-up nonforfeiture benefit on the plan stipulated in the certificate, effective as of such due

date, of such value as specified in this chapter. The certificate may provide, if the society's laws so specify or if the member shall so elect prior to the expiration of the grace period of any overdue premium, that default shall not occur so long as premiums can be paid under the provisions of an arrangement for automatic premium loan as may be set forth in the certificate;

(f) A provision that one paid-up nonforfeiture benefit as specified in the certificate shall become effective automatically unless the member elects another available paid-up nonforfeiture benefit, not later than sixty (60) days after the due date of the premium in default;

(g) A statement of the mortality table and rate of interest used in determining all paid-up nonforfeiture benefits and cash surrender options available under the certificate, and a brief general statement of the method used in calculating such benefits;

(h) A table showing in figures the value of every paid-up nonforfeiture benefit and cash surrender option available under the certificate for each certificate anniversary either during the first twenty (20) certificate years or during the term of the certificate whichever is shorter;

(i) A provision that the certificate shall be incontestable after it has been in force during the lifetime of the member for a period of two (2) years from its date of issue except for nonpayment of premiums, violation of the provisions of the certificate relating to military, aviation, or naval service and violation of the provisions relating to suspension or expulsion as substantially set forth in the certificate. At the option of the society, supplemental provisions relating to benefits in the event of temporary or permanent disability or hospitalization and provisions which grant additional insurance specifically against death by accident or accidental means, may also be excepted. The certificate shall be incontestable on the grounds of suicide after it has been in force during the lifetime of the member for a period of two (2) years from date of issue. The certificate may provide, as to statements made to procure reinstatement, that the society shall have the right to contest a reinstated certificate within a period of two (2) years from date of reinstatement with the same exceptions as herein provided;

(j) A provision that in case the age of the member or of any other person is considered in determining the premium and it is found at any time before final settlement under the certificate that the age has been misstated, and the discrepancy and premium involved have not been adjusted, the amount payable shall be such as the premium would have purchased at the correct age; but if the correct age was not an insurable age under the society's charter or laws, only the premiums paid to the society, less any payments previously made to the member, shall be returned or, at the option of the society, the amount payable under the certificate shall be such as the premium would have purchased at the correct age according to the society's promulgated rates and any extension thereof based on actuarial principles;

(k) A provision or provisions which recite fully, or which set forth the substance of, all sections of the charter, constitution, laws, rules or

regulations of the society, in force at the time of issuance of the certificate, the violation of which will result in the termination of, or in the reduction of, the benefit or benefits payable under the certificate; and

(1) If the constitution or laws of the society provide for expulsion or suspension of a member, any member so expelled or suspended, except for nonpayment of a premium or within the contestable period for material misrepresentations in such member's application for membership shall have the privilege of maintaining his insurance in force by continuing payment of the required premium.

(3) Any of the foregoing provisions or portions thereof not applicable by reason of the plan of insurance or because the certificate is an annuity certificate may, to the extent inapplicable, be omitted from the certificate.

History: En. Sec. 643, Ch. 286, L. 1959.

DECISIONS UNDER FORMER LAW

Recovery of Premiums on Forfeited Policy

In an action to recover back life insurance premiums alleged to have been paid without consideration and under the mistaken idea that the policy was still in force, whereas it had been forfeited for

noncompliance with its conditions, the test whether plaintiff could prevail was whether his beneficiary could have collected the amount thereof had the insured died in the meantime. *Osborne v. Supreme Lodge* etc. Ins. Dept., 69 M 361, 368, 222 P 456.

40-5331. Prohibited provisions. After one year from the effective date of this chapter, no life benefit certificate shall be delivered or issued for delivery in this state containing in substance any of the following provisions:

(1) Any provision limiting the time within which any action at law or in equity may be commenced to less than two (2) years after the cause of action accrues;

(2) Any provision by which the certificate purports to be issued or to take effect more than six (6) months before the original application for the certificate was made, except in case of transfer from one form of certificate to another in connection with which the member is to receive credit for any reserve accumulation under the form of certificate from which the transfer is made; or

(3) Any provision for forfeiture of the certificate for failure to repay any loan thereon or to pay interest on such loan while the total indebtedness, including interest, is less than the loan value of the certificate.

History: En. Sec. 644, Ch. 286, L. 1959.

Collateral References

Applicability to limitation prescribed by policy of insurance, or by special stat-

utory provision in relation to insurance, of provisions of statute of limitations extending time or fixing time when action deemed commenced. 149 ALR 483.

40-5332. "Premiums" defined. As used in this chapter "premiums" means premiums, rates, or other required contributions by whatever name known.

History: En. Sec. 645, Ch. 286, L. 1959.

40-5333. Accident and health insurance and total and permanent disability insurance certificates—filing and approval. (1) No domestic, for-

eign or alien society authorized to do business in this state shall issue or deliver in this state any certificate or other evidence of any contract of accident insurance or health insurance or of any total and permanent disability insurance contract unless and until the form thereof, together with the form of application and all riders or endorsements for use in connection therewith, shall have been filed with the commissioner.

(2) The commissioner shall have power, from time to time, to make, alter and supersede reasonable regulations prescribing the required, optional and prohibited provisions in such contracts, and such regulations shall conform, as far as practicable, to the provisions of chapter 40 of this title (disability insurance policies). Where the commissioner deems inapplicable, either in part or in their entirety, the provisions of chapter 40, he may prescribe the portions or summary thereof of the contract to be printed on the certificate issued to the member.

(3) Any filing made hereunder shall be deemed approved unless disapproved within sixty (60) days from the date of such filing.

History: En. Sec. 646, Ch. 286, L. 1959.

40-5334. Reinsurance. A domestic society may, by a reinsurance agreement, cede any individual risk or risks in whole or in part to an insurer (other than another fraternal benefit society) having the power to make such reinsurance and authorized to do business in this state, or if not so authorized, one which is approved by the commissioner; but no such society may reinsure substantially all of its insurance in force without the written permission of the commissioner. It may take credit for the reserves on such ceded risks to the extent reinsured, but no credit shall be allowed as an admitted asset or as a deduction from liability, to a ceding society for reinsurance made, ceded, renewed, or otherwise becoming effective after the effective date of this chapter, unless the reinsurance is payable by the assuming insurer on the basis of the liability of the ceding society under the contract or contracts reinsured without diminution because of the insolvency of the ceding society.

History: En. Sec. 647, Ch. 286, L. 1959.

40-5335. Funds. (1) All assets shall be held, invested and disbursed for the use and benefit of the society and no member or beneficiary shall have or acquire individual rights therein or become entitled to any apportionment or the surrender of any part thereof, except as provided in the contract.

(2) A society may create, maintain, invest, disburse and apply any special fund or funds necessary to carry out any purpose permitted by the laws of such society.

(3) Every society, the admitted assets of which are less than the sum of its accrued liabilities and reserves under all of its certificates when valued according to standards required for certificates issued after one year from the effective date of this chapter, shall, in every provision of the laws of the society for payments by members of such society, in whatever form made, distinctly state the purpose of the same and the proportion thereof which may be used for expenses, and no part of the money col-

lected for mortuary or disability purposes or the net accretions thereto shall be used for expenses.

History: En. Sec. 648, Ch. 286, L. 1959.

Collateral References

Insurance 698.

46 C.J.S. Insurance § 1443.

DECISIONS UNDER FORMER LAW

Transfer of Surplus to Reserve

Contention that fraternal mutual benefit society had no right to transfer a part of its surplus accumulated under the assessment plan to a newly created reserve division, held not meritorious, inasmuch as a

member does not acquire a severable or proprietary right to any portion of the property as against the society, unless it be in liquidation. *Willson v. Woodmen Of The World*, 104 M 31, 42, 64 P 2d 1064.

40-5336. Investments. A society shall invest its funds only in such investments as are authorized by the laws of this state for the investment of assets of life insurers and subject to the limitations thereon. Any foreign or alien society permitted or seeking to do business in this state which invests its funds in accordance with the laws of the state, district, territory, country or province in which it is incorporated, shall be held to meet the requirements of this section for the investment of funds.

History: En. Sec. 649, Ch. 286, L. 1959.

40-5337. Annual statement. (1) Reports shall be filed and synopses of annual statements shall be published in accordance with the provisions of this section.

(2) Every society transacting business in this state shall annually, on or before the first day of March, unless for cause shown such time has been extended by the commissioner, file with the commissioner a true statement of its financial condition, transactions and affairs for the preceding calendar year and pay a fee of twenty-five dollars (\$25) for filing same. The statement shall be in general form and context as approved by the National Association of Insurance Commissioners for fraternal benefit societies and as supplemented by additional information required by the commissioner.

(3) A synopsis of its annual statement providing an explanation of the facts concerning the condition of the society thereby disclosed shall be printed and mailed to each benefit member of the society not later than June 1 of each year, or, in lieu thereof, such synopsis may be published in the society's official publication.

History: En. Sec. 650, Ch. 286, L. 1959.

40-5338. Annual valuation of certificates. (1) As a part of the annual statement required under section 40-5337, each society shall, on or before the first day of March, file with the commissioner a valuation of its certificates in force on December 31 last preceding, provided, the commissioner may, in his discretion for cause shown, extend the time for filing such valuation for not more than two (2) calendar months. Such report of valuation shall show, as reserve liabilities, the difference between the present mid-year value of the promised benefits provided in the certificates of such society in force and the present mid-year value of the future net premiums as the same are in practice actually collected, not including

therein any value for the right to make extra assessments and not including any amount by which the present mid-year value of future net premiums exceeds the present mid-year value of promised benefits on individual certificates. At the option of any society, in lieu of the above, the valuation may show the net tabular value. Such net tabular value as to certificates issued prior to one year after the effective date of this chapter shall be determined in accordance with the provisions of law applicable prior to the effective date of this chapter and as to certificates issued on or after one year from the effective date of this chapter shall not be less than the reserves determined according to the commissioner's reserve valuation method as hereinafter defined. If the premium charged is less than the tabular net premium according to the basis of valuation used, an additional reserve equal to the present value of the deficiency in such premiums shall be set up and maintained as a liability. The reserve liabilities shall be properly adjusted in the event that the mid-year or tabular values are not appropriate.

(2) Reserves according to the commissioners' reserve valuation method, for the life insurance and endowment benefits of certificates providing for a uniform amount of insurance and requiring the payment of uniform premiums shall be the excess, if any, of the present value, at the date of valuation, of such future guaranteed benefits provided for by such certificates, over the then present value of any future modified net premiums therefor. The modified net premiums for any such certificate shall be such uniform percentage of the respective contract premiums for such benefits that the present value, at the date of issue of the certificate, of all such modified net premiums shall be equal to the sum of the then present value of such benefits provided for by the certificate and the excess of (a) over (b), as follows:

(a) A net level premium equal to the present value, at the date of issue, of such benefits provided for after the first certificate year, divided by the present value, at the date of issue, of an annuity of one per annum payable on the first and each subsequent anniversary of such certificate on which a premium falls due; provided however, that such net level annual premium shall not exceed the net level annual premium on the nineteen year premium whole life plan for insurance of the same amount at an age one year higher than the age at issue of such certificate; and

(b) A net one-year term premium for such benefits provided for in the first certificate year.

(3) Reserves according to the commissioners' reserve valuation method for (a) life insurance benefits for varying amounts of benefits or requiring the payment of varying premiums, (b) annuity and pure endowment benefits, (c) disability and accidental death benefits in all certificates and contracts, and (d) all other benefits except life insurance and endowment benefits, shall be calculated by a method consistent with the principles of subsection (2), above.

(4) The present value of deferred payments due under incurred claims or matured certificates shall be deemed a liability of the society and shall be computed upon mortality and interest standards prescribed in subsections (6) and (7) below.

(5) Such valuation and underlying data shall be certified by a competent actuary or, at the expense of the society, verified by the actuary of the department of insurance of the state of domicile of the society.

(6) The minimum standards of valuation for certificates issued prior to one year from the effective date of this chapter shall be those provided by the law applicable immediately prior to the effective date of this chapter but not lower than the standards used in the calculating of rates for such certificates.

(7) The minimum standard of valuation for certificates issued after one year from the effective date of this chapter shall be three and one-half per cent ($3\frac{1}{2}\%$) interest and the following tables:

(a) For certificates of life insurance—American men ultimate table of mortality, with Bowerman's or Davis' extension thereof or with the consent of the commissioner, the commissioner's 1941 standard ordinary mortality table or the commissioner's 1941 standard industrial table of mortality;

(b) For annuity certificates, including life annuities provided or available under optional modes of settlement in such certificates—the 1937 standard annuity table;

(c) For disability benefits issued in connection with life benefit certificates—Hunter's disability table, which, for active lives, shall be combined with a mortality table permitted for calculating the reserves on life insurance certificates, except that the table known as class III disability table (1926) modified to conform to the contractual waiting period, shall be used in computing reserves for disability benefits under a contract which presumes that total disability shall be considered to be permanent after a specified period;

(d) For accidental death benefits issued in connection with life benefit certificates—the inter-company double indemnity mortality table combined with a mortality table permitted for calculating the reserves for life insurance certificates; and

(e) For noncancellable accident and health benefits—the class III disability table (1926) with conference modifications or, with the consent of the commissioner, tables based upon the society's own experience.

(8) The commissioner may, in his discretion, accept other standards for valuation if he finds that the reserves produced thereby will not be less in the aggregate than reserves computed in accordance with the minimum valuation standard herein prescribed. The commissioner may, in his discretion, vary the standards of mortality applicable to all certificates of insurance on substandard lives or other extra-hazardous lives by any society authorized to do business in this state. Whenever the mortality experience under all certificates valued on the same mortality table is in excess of the expected mortality according to such table for a period of three consecutive years, the commissioner may require additional reserves when deemed necessary in his judgment on account of such certificates.

(9) Any society, with the consent of the insurance supervisory official of the state of domicile of the society and under such conditions, if any,

which he may impose, may establish and maintain reserves on its certificates in excess of the reserves required hereunder, but the contractual rights of any insured member shall not be affected thereby.

History: En. Sec. 651, Ch. 286, L. 1959.

Collateral References

Insurance 691.

46 C.J.S. Insurance § 1436.

40-5339. Annual statement—penalty for failure to file or to comply. A society neglecting to file the annual statement in the form and within the time provided by this section shall forfeit one hundred dollars (\$100) for each day during which such neglect continues, and, upon notice by the commissioner to that effect, its authority to do business in this state shall cease while such default continues.

History: En. Sec. 652, Ch. 286, L. 1959.

40-5340. Examination of domestic societies. (1) The commissioner, or any person he may appoint, shall have the power of visitation and examination into the affairs of any domestic society and he shall make such examination at least once in every three (3) years. He may employ assistants for the purpose of such examination, and he, or any person he may appoint, shall have free access to all books, papers and documents that relate to the business of the society.

(2) In making any such examination the commissioner may summon and qualify as witnesses under oath and examine its officers, agents and employees or other persons in relation to the affairs, transactions and condition of the society.

(3) A summary of the report of the commissioner and such recommendations or statements of the commissioner as may accompany such report, shall be read at the first meeting of the board of directors or corresponding body of the society following the receipt thereof, and if directed so to do by the commissioner, shall also be read at the first meeting of the supreme legislative or governing body of the society following the receipt thereof. A copy of the report, recommendations and statements of the commissioner shall be furnished by the society to each member of such board of directors or other governing body.

(4) The expense of each examination and of each valuation, including compensation and actual expense of examiners, shall be paid by the society examined or whose certificates are valued, upon statements furnished by the commissioner.

History: En. Sec. 653, Ch. 286, L. 1959.

Collateral References

Insurance 691.

46 C.J.S. Insurance § 1436.

40-5341. Examination of foreign and alien societies. The commissioner, or any person whom he may appoint, may examine any foreign or alien society transacting or applying for admission to transact business in this state. He may employ assistants and he, or any person he may appoint, shall have free access to all books, papers and documents that relate to the business of the society. He may in his discretion accept, in lieu of such examination, the examination of the insurance department of the state,

territory, district, province or country where such society is organized. The compensation and actual expenses of the examiners making any examination or general or special valuation shall be paid by the society examined or by the society whose certificate obligations have been valued, upon statements furnished by the commissioner.

History: En. Sec. 654, Ch. 286, L. 1959.

40-5342. No adverse publications. Pending, during or after an examination or investigation of a society, either domestic, foreign or alien, the commissioner shall make public no financial statement, report or finding, nor shall he permit to become public any financial statement, report or finding affecting the status, standing or rights of any society, until a copy thereof shall have been served upon the society at its principal office and the society shall have been afforded a reasonable opportunity to answer any such financial statement, report or finding and to make such showing in connection therewith as it may desire.

History: En. Sec. 655, Ch. 286, L. 1959.

40-5343. Taxation. Every society organized or licensed under this chapter is hereby declared to be a charitable and benevolent institution, and all of its funds shall be exempt from all and every state, county, district, municipal and school tax other than taxes on real estate and office equipment.

History: En. Sec. 656, Ch. 286, L. 1959.

Exemption from taxation of property of fraternal or relief association. 22 ALR 907.

Collateral References

Taxation \hookrightarrow 241(3).

84 C.J.S. Taxation § 295.

40-5344. Licensing of agents. (1) Agents of societies shall be licensed in accordance with the provisions of sections 40-5344 through 40-5348 of this chapter.

(2) Insurance agent defined: The term "insurance agent" as used in this chapter means any authorized or acknowledged agent of a society who acts as such in the solicitation, negotiation or procurement or making of a life insurance, accident and health insurance or annuity contract; except that the term "insurance agent" shall not include:

(a) Any regular salaried officer or employee of a licensed society who devotes substantially all of his services to activities other than the solicitation of fraternal insurance contracts from the public, and who receives for the solicitation of such contracts no commission or other compensation directly dependent upon the amount of business obtained; or

(b) Any agent or representative of a society who devotes or intends to devote, less than fifty per cent (50%) of his time to the solicitation and procurement of insurance contracts for such society. Any person who in the preceding calendar year has solicited and procured life insurance contracts on behalf of any society in an amount of insurance in excess of fifty thousand dollars (\$50,000), or, in the case of any other kind or kinds of insurance which the society might write, on the persons of more than twenty-five (25) individuals and who has received or will receive a commission or other compensation therefor, shall be presumed to be devoting,

or intending to devote, fifty per cent (50%) of his time to the solicitation or procurement of insurance contracts for such society.

History: En. Sec. 657, Ch. 286, L. 1959.

40-5345. Agent license required. (1) Any person who in this state acts as insurance agent for a society without having authority so to do by virtue of a license issued and in force pursuant to the provisions of this chapter shall, except as provided in section 40-5344(2), be guilty of a misdemeanor.

(2) No society doing business in this state shall pay any commission or other compensation to any person for any services in obtaining in this state any new contract of life, accident or health insurance, or any new annuity contract, except to a licensed insurance agent of such society and except an agent exempted under section 40-5344(2).

History: En. Sec. 658, Ch. 286, L. 1959.

40-5346. Qualifications, application for agent's license. (1) The commissioner may issue an agent's license to any person who has paid an annual license fee of five dollars (\$5) and who has complied with the requirements of this section, authorizing such licensee to act as an insurance agent on behalf of any society named in such license which is authorized to do business in this state.

(2) Before any insurance agent's license shall be issued there shall be on file in the office of the commissioner the following documents:

(a) A written application by the prospective licensee in such form or forms and supplements thereto, and containing such information, as the commissioner may prescribe; and

(b) A certificate by the society which is to be named in such license, stating that such society has satisfied itself that the named applicant is trustworthy and competent to act as such insurance agent and that the society will appoint such applicant to act as its agent if the license applied for is issued by the commissioner. Such certificates shall be executed and acknowledged by an officer or managing agent of such society.

(3) No written or other examination shall be required of any individual seeking to be named as a licensee to represent a fraternal benefit society as its agent.

(4) The commissioner may refuse to issue or renew any insurance agent's license if in his judgment the proposed licensee is not trustworthy and competent to act as such agent, or has given cause for revocation or suspension of such license, or has failed to comply with any prerequisite for the issuance or renewal, as the case may be, of such license.

History: En. Sec. 659, Ch. 286, L. 1959.

40-5347. Agents' licenses—expiration, renewal. (1) Every agent's license, and every renewal thereof, shall expire on December 31 of the even-numbered calendar year following the calendar year in which such license or renewal license was issued.

(2) If the application for a renewal license has been filed with the commissioner on or before December 31 of the year in which the existing

license is to expire, such applicant named in such existing license may continue to act as insurance agent under such existing license, unless same shall be revoked or suspended, until the issuance by the commissioner of the renewal license or until the expiration of five (5) days after he has refused to renew such license and has served written notice of such refusal on the applicant. If the applicant shall, within thirty (30) days after such notice is given, notify the commissioner in writing of his request for a hearing on such refusal, the commissioner shall, within a reasonable time after receipt of such notice, grant such hearing, and he may, in his discretion, reinstate such license.

(3) Any such renewal license of an insurance agent may be issued upon the application of the society named in the existing license. Such application shall be in the form or forms prescribed by the commissioner and shall contain such information as he may require. The application shall contain a certificate executed by the president, or by a vice-president, a secretary, an assistant secretary, or corresponding officer by whatever name known, or by an employee expressly designated and authorized to execute such certificate of a domestic or foreign society or by the United States manager of an alien society, stating that the addresses therein given of the agents of such society for whom renewal licenses are requested therein have been verified in each instance immediately preceding the preparation of the application. Notwithstanding the filing of such application, the commissioner may, after reasonable notice to any such society, require that any or all agents of such society to be named as licensees in renewal licenses shall execute and file separate applications for the renewal of such licenses, as hereinbefore specified, and he may also require that each such application shall be accompanied by the certificate specified in section 40-5346(2)(b).

History: En. Sec. 660, Ch. 286, L. 1959.

40-5348. Notice of termination of agent appointment. Every society shall, upon the termination of the appointment of any insurance agent licensed to represent it in this state, forthwith file with the commissioner a statement, in such form as he may prescribe, of the facts relative to such termination and the cause thereof. Every statement made pursuant to this section shall be deemed a privileged communication.

History: En. Sec. 661, Ch. 286, L. 1959.

40-5349. Suspension, revocation of agent's license. (1) The commissioner may revoke, or may suspend for such period as he may determine, any insurance agent's license if, after notice and hearing as specified in section 40-5347(2), he determines that the licensee has:

- (a) Violated any provision of, or any obligation imposed by, this chapter, or has violated any law in the course of his dealings as agent;
- (b) Made a material misstatement in the application for such license;
- (c) Been guilty of fraudulent or dishonest practices;
- (d) Demonstrated his incompetency or untrustworthiness to act as an insurance agent; or

(e) Been guilty of rebating as defined by the laws of this state applicable to life insurers.

(2) The revocation or suspension of any agent's license shall terminate forthwith the license of such agent. No individual whose license has been revoked shall be entitled to obtain any insurance agent's license under the provisions of this chapter for a period of one year after such revocation or, if such revocation be judicially reviewed, for one year after the final determination thereof affirming the action of the commissioner in revoking such license.

History: En. Sec. 662, Ch. 286, L. 1959.

40-5350. Misrepresentation. No person shall cause or permit to be made, issued or circulated in any form:

(1) Any misrepresentation or false or misleading statement concerning the terms, benefits or advantages of any fraternal insurance contract now issued or to be issued in this state, or the financial condition of any society;

(2) Any false or misleading estimate or statement concerning the dividends or shares of surplus paid or to be paid by any society on any insurance contract; or

(3) Any incomplete comparison of an insurance contract of one society with an insurance contract of another society or insurer for the purpose of inducing the lapse, forfeiture or surrender of any insurance contract. A comparison of insurance contracts is incomplete if it does not compare in detail:

(a) The gross rates, and the gross rates less any dividend or other reduction allowed at the date of the comparison; and

(b) Any increase in cash values, and all the benefits provided by each contract for the possible duration thereof as determined by the life expectancy of the insured; or if it omits from consideration:

(c) Any benefit or value provided in the contract;

(d) Any differences as to amount or period of rates; or

(e) Any differences in limitations or conditions or provisions which directly or indirectly affect the benefits.

In any determination of the incompleteness or misleading character of any comparison or statement, it shall be presumed that the insured had no knowledge of any of the contents of the contract involved.

(4) Any person who violates any provision of this section or knowingly receives any compensation or commission by or in consequence of such violation, shall upon conviction be punished by a fine not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) or by imprisonment in the county jail not less than thirty (30) days nor more than ninety (90) days, or both fine and imprisonment and shall in addition, be liable for civil penalty in the amount of three (3) times the sum received by such violator as compensation or commission, which penalty may be sued for and recovered by any person or society aggrieved for his

or its own use and benefit in accordance with the provisions of civil practice.

History: En. Sec. 663, Ch. 286, L. 1959.

Collateral References

Insurance Ⓒ689.

46 C.J.S. Insurance § 1436.

40-5351. Discrimination and rebates. (1) No society doing business in this state shall make or permit any unfair discrimination between insured members of the same class and equal expectation of life in the premiums charged for certificates of insurance, in the dividends or other benefits payable thereon or in any other of the terms and conditions of the contracts it makes.

(2) No society, by itself, or any other party, and no agent or solicitor, personally, or by any other party, shall offer, promise, allow, give, set off, or pay, directly or indirectly, any valuable consideration or inducement to, or for insurance, on any risk authorized to be taken by such society, which is not specified in the certificate. No member shall receive or accept, directly or indirectly, any rebate of premium, or part thereof, or agent's or solicitor's commission thereon, payable on any certificate or receive or accept any favor or advantage or share in the dividends or other benefits to accrue on, or any valuable consideration or inducement not specified in the contract of insurance.

History: En. Sec. 664, Ch. 286, L. 1959.

40-5352. Service of process. (1) Every society authorized to do business in this state shall appoint in writing the commissioner and each successor in office to be its true and lawful attorney upon whom all lawful process in any action or proceeding against it shall be served, and shall agree in such writing that any lawful process against it which is served on said attorney shall be of the same legal force and validity as if served upon the society, and that the authority shall continue in force so long as any liability remains outstanding in this state. Copies of such appointment, certified by the commissioner, shall be deemed sufficient evidence thereof and shall be admitted in evidence with the same force and effect as the original thereof might be admitted.

(2) Service shall only be made upon the commissioner, or if absent, upon the person in charge of his office. It shall be made in duplicate and shall constitute sufficient service upon the society. When legal process against a society is served upon the commissioner, he shall forthwith forward one of the duplicate copies by registered mail, prepaid, directed to the secretary or corresponding officer. No such service shall require a society to file its answer, pleading or defense in less than thirty (30) days from the date of mailing the copy of the service to a society. Legal process shall not be served upon a society except in the manner herein provided. At the time of serving any process upon the commissioner, the plaintiff or complainant in the action shall pay to the commissioner a fee of two dollars (\$2).

History: En. Sec. 665, Ch. 286, L. 1959.

Cross-Reference

Application of Montana Rules of Civil Procedure to this section, sec. 93-2711-7.

Collateral References

Insurance—814.

46 C.J.S. Insurance § 1626.

Who, other than public official, may be served with process in action against foreign corporation doing business in state. 113 ALR 9, 100.

DECISIONS UNDER FORMER LAW**Action against Foreign Association**

Under former section 40-2118, foreign mutual benefit associations could be sued in the courts of Montana; the object of the section in requiring the appointment of an agent in the state upon whom service

of process may be made was to provide for the collection of debts due from them to its citizens and to enforce the contracts made in the state through their agents. *Reed v. Woodmen Of The World*, 94 M 374, 383, 22 P 2d 819.

40-5353. Consolidations and mergers. (1) A domestic society may consolidate or merge with any other society by complying with the provisions of this section. It shall file with the commissioner:

(a) A certified copy of the written contract containing in full the terms and conditions of the consolidation or merger;

(b) A sworn statement by the president and secretary or corresponding officers of each society showing the financial condition thereof on a date fixed by the commissioner but not earlier than December 31, next preceding the date of the contract;

(c) A certificate of such officers, duly verified by their respective oaths, that the consolidation or merger has been approved by a two-thirds vote of the supreme legislative or governing body of each society; and

(d) Evidence that at least sixty (60) days prior to the action of the supreme legislative or governing body of each society, the text of the contract has been furnished to all members of each society either by mail or by publication in full in the official organ of each society.

(2) The affidavit of any officer of the society or of anyone authorized by it to mail any notice or document, stating that such notice or document has been duly addressed and mailed, shall be prima facie evidence that such notice or document has been furnished the addressees.

(3) If the commissioner finds that the contract is in conformity with the provisions of this section, that the financial statements are correct and that the consolidation or merger is just and equitable to the members of each society, he shall approve the contract and issue his certificate to such effect. Upon such approval, the contract shall be in full force and effect unless any society which is a party to the contract is incorporated under the laws of any other state. In such event the consolidation or merger shall not become effective unless and until it has been approved as provided by the laws of such state and a certificate of such approval filed with the commissioner or, if the laws of such state contain no such provision, then the consolidation or merger shall not become effective unless and until it has been approved by the insurance supervisory official of such state and a certificate of such approval filed with the commissioner.

History: En. Sec. 666, Ch. 286, L. 1959.

Collateral References

38 Am. Jur. 450, Mutual Benefit Societies, § 9.

40-5354. Consolidations and mergers—effect. Upon the consolidation or merger becoming effective as provided in section 40-5353, all the rights,

franchises and interests of the consolidated or merged societies in and to every species of property, real, personal or mixed, and things in action thereunto belonging shall be vested in the society resulting from or remaining after the consolidation or merger without any other instrument; except that conveyances of real property may be evidenced by proper deeds, and the title to any real estate or interest therein, vested under the laws of this state in any of the societies consolidated or merged, shall not revert or be in any way impaired by reason of the consolidation or merger, but shall vest absolutely in the society resulting from or remaining after such consolidation or merger.

History: En. Sec. 667, Ch. 286, L. 1959.

40-5355. Conversion into mutual life insurer. Any domestic fraternal benefit society may be converted and licensed as a mutual life insurer by compliance with the applicable requirements of chapter 47 of this title, if such plan of conversion has been approved by the commissioner. Such plan shall be prepared in writing setting forth in full the terms and conditions thereof. The board of directors shall submit the plan to the supreme legislative or governing body of such society at any regular or special meeting thereof, by giving a full, true and complete copy of the plan with the notice of such meeting. The notice shall be given as provided in the laws of the society for the convocation of a regular or special meeting of such body, as the case may be. The affirmative vote of two-thirds of all members of such body shall be necessary for the approval of the agreement. No such conversion shall take effect unless and until approved by the commissioner, who may give such approval if he finds that the proposed change is in conformity with the requirements of law and not prejudicial to the certificate holders of the society.

History: En. Sec. 668, Ch. 286, L. 1959.

40-5356. Injunction—liquidation—receivership of domestic society. (1) When the commissioner upon investigation finds that a domestic society:

- (a) Has exceeded its powers;
- (b) Has failed to comply with any provision of this chapter;
- (c) Is not fulfilling its contracts in good faith;
- (d) Has a membership of less than four hundred (400) after an existence of one year or more; or
- (e) Is conducting business fraudulently or in a manner hazardous to its members, creditors, the public or the business; he shall notify the society of his findings, state in writing the reasons for his dissatisfaction, and require the society to show cause on a date named why it should not be enjoined from carrying on any business until the violation complained of shall have been corrected, or why an action in quo warranto should not be commenced against the society.

(2) If on such date the society does not present good and sufficient reasons why it should not be so enjoined or why such action should not be commenced, the commissioner may present the facts relating thereto to the attorney general who shall, if he deems the circumstances warrant, commence an action to enjoin the society from transacting business or in

quo warranto. The court shall thereupon notify the officers of the society of a hearing. If after a full hearing it appears that the society should be so enjoined or liquidated or a receiver appointed, the court shall enter the necessary order.

(3) No society so enjoined shall have the authority to do business until:

(a) The commissioner finds that the violation complained of has been corrected;

(b) The costs of such action have been paid by the society if the court finds that the society was in default as charged;

(c) The court has dissolved its injunction; and

(d) The commissioner has reinstated the society's license.

(4) If the court orders the society liquidated, it shall be enjoined from carrying on any further business, whereupon the receiver of the society shall proceed at once to take possession of the books, papers, money and other assets of the society and, under the direction of the court, proceed forthwith to close the affairs of the society and to distribute its funds to those entitled thereto.

(5) No action under this section shall be recognized in any court of this state unless brought by the attorney general upon request of the commissioner. Whenever a receiver is to be appointed for a domestic society, the court shall appoint the commissioner as such receiver.

(6) The provisions of this section relating to hearing by the commissioner, action by the attorney general at the request of the commissioner, hearing by the court, injunction and receivership shall be applicable to a society which voluntarily determines to discontinue business.

History: En. Sec. 669, Ch. 286, L. 1959.

Cross-Reference

Application of Montana Rules of Civil Procedure to proceedings under this section, sec. 93-2711-7.

40-5357. Injunction. No application or petition for injunction against any domestic, foreign or alien society, or branch thereof, shall be recognized in any court of this state unless made by the attorney general upon request of the commissioner.

History: En. Sec. 670, Ch. 286, L. 1959.

Collateral References

Insurance \S 703.

46 C.J.S. Insurance \S 1450.

40-5358. Review. All decisions and findings of the commissioner made under the provisions of this chapter shall be subject to review by the court in accordance with the provisions of section 40-2725.

History: En. Sec. 671, Ch. 286, L. 1959.

40-5359. Other provisions applicable. In addition to the provisions contained in this chapter, other chapters and provisions of this title shall apply to fraternal benefit societies, to the extent applicable and not in conflict with the express provisions of this chapter and the reasonable implications thereof, as follows:

(1) Chapter 26 (scope of code).

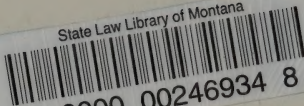
(2) Chapter 27 (the commissioner of insurance), with the exception of section 40-2726 (fees and licenses).

(3) The following sections of chapter 28 (authorization of insurers and general requirements):

- (a) Section 40-2805 (name of insurer).
- (b) Section 40-2810 (management and affiliations).
- (4) Section 40-3401 (representing or aiding unauthorized insurer prohibited).
- (5) Chapter 35 (trade practices and frauds).
- (6) Section 40-3731 (minor may give acquittance).
- (7) Section 40-4723 (prohibited pecuniary interest of officials).
- (8) Section 40-4750 (extinguishment of unused corporate charters).
- (9) Chapter 51 (rehabilitations and liquidations).

History: En. Sec. 672, Ch. 286, L. 1959.

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